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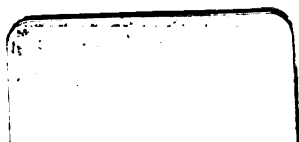
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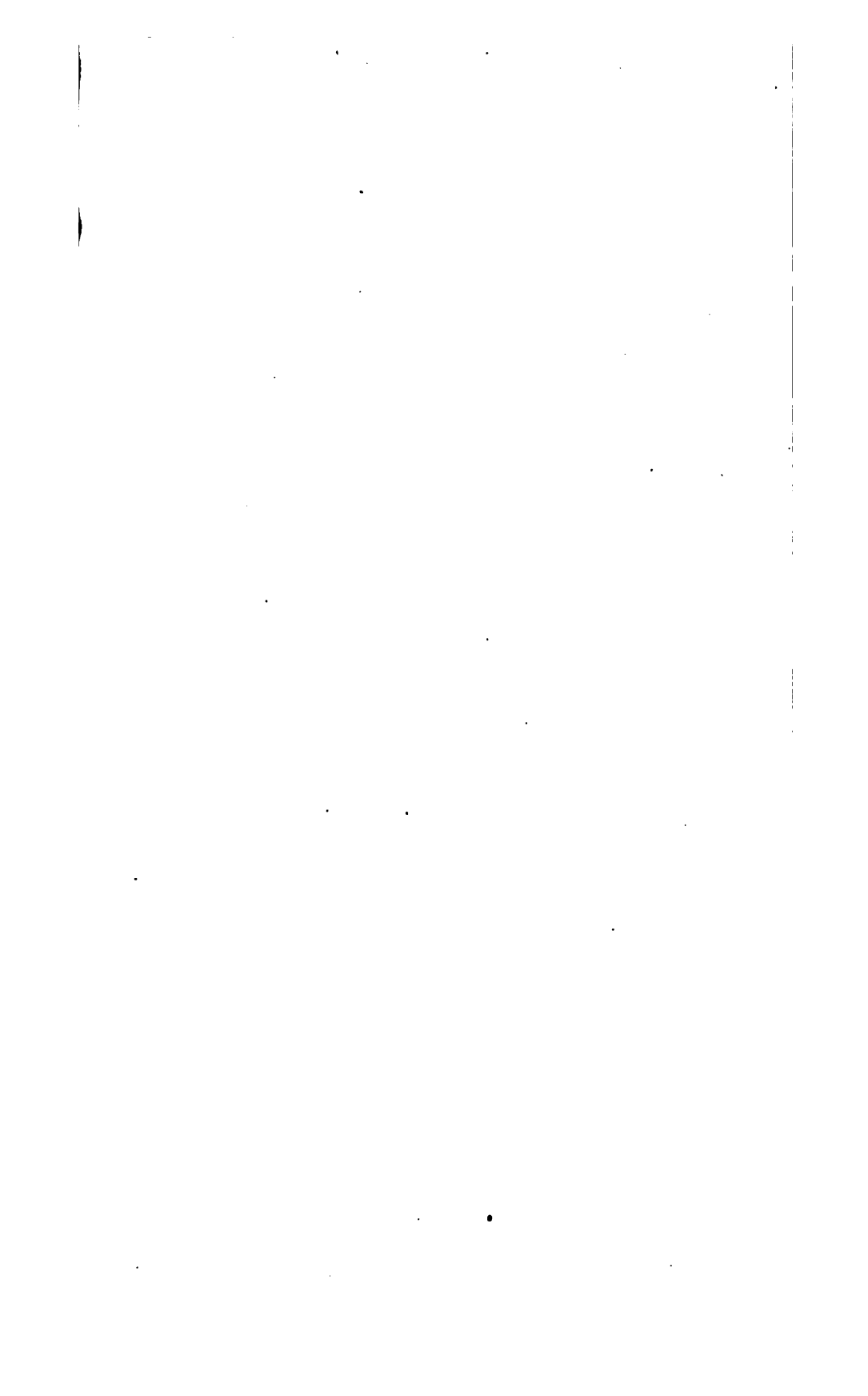
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
UNITED STATES
FOR THE
EIGHTH JUDICIAL CIRCUIT.

REPORTED BY
GEO. W. M'CRARY,
THE CIRCUIT JUDGE.

VOLUME I.

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JUDGES
OF THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
EIGHTH JUDICIAL CIRCUIT.

HON. SAMUEL F. MILLER, Circuit Justice.
HON. GEORGE W. McCRARY, Circuit Judge.

DISTRICT JUDGES.

HON. RENSSELAER R. NELSON, District of Minnesota.
HON. JAS. M. LOVE, District of Iowa.
HON. SAMUEL TREAT, Eastern District of Missouri.
HON. ARNOLD KREKEL, Western District of Missouri.
HON. CASSIUS G. FOSTER, District of Kansas.
HON. ELMER S. DUNDY, District of Nebraska.
HON. HENRY C. CALDWELL, Eastern District of Arkansas.
HON. ISAAC C. PARKER, Western District of Arkansas.
HON. MOSES HALLETT, District of Colorado.

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REPORTS OF CASES ARGUED AND DETERMINED

IN THE

Circuit Courts of the United States,

FOR THE

EIGHTH JUDICIAL CIRCUIT.

THE UNITED STATES *v.* THE PACIFIC RAILROAD *et al.*

(*Eastern District of Missouri.* March, 1880.)

1. TAXES, LIEN FOR, WHEN IT ATTACHES, AND TO WHAT PROPERTY.— Under the provisions of sec. 3186 of the Revised Statutes of the United States, the lien of the United States for delinquent taxes attaches only to property of the delinquent tax payer, owned by him at the time when payment of such taxes is demanded.
2. STATUTES CREATING LIENS, INNOCENT PURCHASERS.— Statutes creating liens upon property should be construed favorably to innocent purchasers of such property.
3. INTERNAL REVENUE ACT OF 1864 — LIEN, HOW ESTABLISHED.— Under the internal revenue act of 1864, and 1866, it is necessary, in order to establish and enforce a lien for taxes, that all the prerequisites of those laws shall be strictly complied with.
4. SAME NECESSITY FOR ASSESSMENT, etc.— Under said internal revenue laws, it is necessary that an assessment return or list of the taxes delinquent should be had, before, and in addition to, the demand, which is the foundation of the lien.

Mr. Ellis, for the United States.

Mr. Day, for defendants.

In equity. Demurrer to bill.

McCrary, *Circuit Judge*.—This is a bill in equity, filed by the United States, to enforce a lien upon property, formerly

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owned by the Pacific Railroad, for taxes amounting in the aggregate, including penalties, to something over \$135,000. The tax claimed as delinquent accrued during periods of time extending from July 1, 1864, to February 28, 1871, and is the income tax, or the tax upon the receipts and profits of said company, during those periods. When the tax accrued the Pacific Railroad was the owner of the property against which the lien is sought to be enforced, but since that time several large mortgages have been executed upon the same, and under a foreclosure of one of these the property was, on the sixth of September, 1876, sold to one James Baker, who, on the twenty-first day of October, 1876, conveyed the same to the Missouri Pacific Railroad Company, the present owner. The last-named company mortgaged the property November 1, 1876, to secure bonds to the amount of \$4,500,000. The present owner, as well as the several lien holders, are made parties, and the prayer of the bill is for decree declaring the taxes aforesaid to be a lien on said property prior and paramount to any claim on their part, and for a foreclosure and sale. It is conceded that the tax was never assessed by any officer of the government, but it is insisted that this was not necessary, because there was an assessment by operation of law which was equally effective. The bill avers that demands were made for the payment of the taxes claimed on the second of November, 1877, and on the sixteenth of July, 1879; both dates being subsequent to the execution of the several mortgages aforesaid, and also to the purchase of the property by the present owner.

The defendants demur to the bill upon the ground that the same constitutes no cause of action, for the following, among other reasons:

“That even if the complainant has a lien it only took effect at the time the demand is averred to have been made, and so is subject to the title of the mortgagees and purchaser represented by the defendants.”

In considering the demurrer we are called upon to construe the statute under which the lien is claimed. This statute is

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found in the act of July 13, 1866 (14 Stat. 107), and is also embodied in section 3186 of the Revised Statutes, and is as follows:

"And if any person, bank, association, company or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States, from the time it was due until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights of property belonging to such person, bank, association, company or corporation."

The question is as to the meaning of the words "upon all property and rights of property belonging to such person, bank, association, company or corporation." Does the language apply to the property belonging to the Pacific Railroad when the taxes accrued, or only to that belonging to that company when the demand by which the lien was created was made?

It was said by Mr. Justice MILLER, in *United States v. Pacific Railroad*, 4 Dillon, 71, that "in construing this section it is proper to consider the extraordinary nature of this lien. It is," he said, "not only a lien upon the land, but is a lien upon the personal property; it is not only a lien upon property in possession, but upon all rights to property depending upon contracts, and upon unexecuted contracts; it not only creates a present lien, but it relates back." He further observes that the demand may be made long after the maturity of the tax, and will create a lien which relates back and establishes itself upon "the property or rights of property of the defendant." The question in that case was as to the sufficiency of the demand, and the precise point now under discussion did not arise; but I think I am within the spirit of that opinion when I say that the statute should not be construed as subjecting property which has been conveyed to innocent purchasers, prior to any demand, unless this is its plain meaning. The consequences of such a ruling would be so serious and far-reaching that I should not be willing to invoke them

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by any doubtful interpretation. There is no limitation as to the time within which the government may proceed against persons who failed to comply with the income and other internal tax laws. I have no doubt such persons are numerous. Many of them may be insolvent now, but may have owned property, when the taxes accrued, which has since passed through many hands. The law may well be liberally construed and rigidly enforced as against the guilty, especially where they have concealed their property or otherwise attempted to evade their just obligations to the government. But if, upon making demand now, at the end of twelve or fifteen years from the time when the taxes were due, the government can establish a lien upon all the property then owned by the delinquent tax payers, it would result that in most cases not the guilty, but the innocent, would be made to suffer. Such a doctrine would also unsettle the titles to real estate, since it would be impossible to know or to ascertain whether the owner has not, during the existence of the income tax law, suppressed the truth as to his receipts and earnings, or made a false return thereof. In my opinion the language of the statute does not require the construction contended for by counsel for the government. If congress had intended to make the statute so far-reaching as to subject property in the hands of innocent purchasers, who became owners years before any step was taken by the government to assert its lien, this intention would have been plainly expressed. Such, however, is not the case. Let us examine the phraseology: "If any person, * * liable to pay a tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, * * * upon all property, etc., *belonging* to such person," etc. The statute does not say "upon all property which may have belonged to such person when the tax accrued."

This or similar language would, I think, have been employed if congress had intended to give the statute this effect. It must be conceded that the words "all property * * *

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belonging to such person" must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the *language* of the law, refer them to the time when the tax became due, and make the clause read "all property, etc., belonging to such person, etc., at the time the tax became due." This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, and may be phrased thus: "All property, etc., belonging to such person at the time such demand is made." By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand. This view also harmonizes with the general policy of the law relating to land titles, which is to protect the citizen against loss from secret liens, not disclosed by any public record nor ascertainable by due diligence. Nor is it unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail; but, if the opposite view is sustained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character.

Another ground of demurrer is as follows: "Because it appears that no assessment return or list was ever made of said taxes, and so there can be no lien therefor."

The question whether an assessment by the assessor or other officer, authorized by law to make it, is a necessary step in the creation of a lien for taxes under the internal revenue laws, is, so

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far as I know, undecided. Those laws provided for assessors, whose duties were very particularly prescribed. They were clothed with power to summon any person failing to deliver a list or return of taxes within the time required, or making a false return, as well as any other person, whether residing within or without the state, for the purpose of requiring testimony under oath respecting any objects liable to tax, and disobedience to such summons was made punishable as a contempt of court; and, in case any person or corporation failed to make a proper and true return, the assessor was required, from the best information he could obtain from an examination of witnesses, and on his own view and information, to himself make a list or return of all such person's taxes, including special and income taxes. The assessor was authorized to hear and determine appeals concerning taxes returned in the annual list, and after disposing of these he was to make out lists containing the sums, payable according to law, upon every subject of taxation for each collection district, which list was to contain the name of each person residing in said district liable to tax, and to furnish to the collectors of the several collection districts, respectively, copies of such lists. The collector was required to receipt for said lists, and thereupon to give public notice that the taxes therein specified had become due and payable, and to fix a time and place within the county at which he or his deputy was to attend and receive the same. Then follows the provision already quoted, providing that if any person, bank, association, company, or corporation, liable to pay any tax, should neglect or refuse to pay the same after demand, the amount should be a lien, etc. I have given, without quoting at length, the substance of the provisions of the revenue laws applicable to the questions now under consideration, as they are found in the acts of June 30, 1864 (13 Stat. 223), and of July, 1866 (14 Stat. 97). The question is, whether the several steps in the preparation of the assessment lists and their return to the collector must precede the demand, which is the foundation of the lien. The supreme court has decided in two

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cases that the obligation to pay the tax does not depend on an assessment made by an officer, but that, the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it. *The Dollar Savings Bank v. United States*, 19 Wall. 227; *King v. United States*, 99 U. S. 229.

The question in these cases was, however, simply as to the liability of the delinquent himself when sued in an action of debt for taxes due and unpaid, but never assessed by an officer. The present is a very different case; here the object is not to enforce a common law remedy in the collection of an admitted indebtedness, but to enforce a statutory lien against property which was once the property of the debtor, but is now in the possession and ownership of others. It is well settled that, in order to support and enforce a statutory lien for taxes, all the prerequisites of the laws granting the lien must be strictly complied with. *Thatcher v. Powell*, 6 Wheat. 119; *Parker v. Rule's Lessee*, 9 Cranch, 64; *Rouhendorf v. Taylor*, 4 Pet. 349; *Stead's Ex'r v. Course*, 4 Cranch, 403; *Early v. Doe*, 16 How. 618; *Williams v. Peyton's Lessee*, 4 Wheat. 77; *Mayhew v. Davis*, 4 McLean, 213, 217; Hilliard on Taxation, 291; Cooley on Taxation, 258, 259; 2 Dillon on Mun. Corp. § 658.

The distinction between a suit to enforce a lien of this character, and an action at common law to recover a judgment for unpaid and past due taxes, was clearly recognized and strongly stated by Mr. Justice MILLER, in his opinion in the former case in this court, between the parties to this suit, already cited (4 Dill. 71), in which he said, in referring to a suit to enforce such a lien: "All this is a very different thing from the collection of the taxes by the ordinary processes of dstraint, or by a suit against the party for the amount of them. In an action of debt no such demand is necessary for the collection, as the supreme court of the United States has decided, because, when the dividends are declared, or the interest paid, the law annexes to it the obligation to pay five per cent. on that amount.

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But the law does not annex to that any lien on a man's property. The law does not annex to those taxes, as taxes *ex proprio vigore*, any lien."

In the same opinion he further said that, in view of the extraordinary character of this statute, and of the lien created thereby, "it is reasonable, and it is proper, that all the steps which the law requires of the party creating the lien in his own favor shall be pursued strictly."

Is, then, the assessment (in a case like the present, where no return was made) one of the steps required by the law in the establishment of a lien? I am clearly of the opinion that it is. The regular order established by the statute is:

1. The return or the assessment by which the amount of the tax is fixed. 13 Stat. 225, 230, §§ 12, 21, inclusive; 14 Stat. 101, 104.

2. The notice that the taxes are due, and informing tax payers of the time and place of payment. 13 Stat. 232, § 26; 14 Stat. 106.

3. The demand for the payment of the specific sum due from the individual tax payer who may have neglected or refused to pay the same. 14 Stat. 107.

I do not feel at liberty to hold that any one of these steps is non-essential. A demand implies the previous ascertainment of the sum due, and this ascertainment is by means of the return or assessment.

The lien is not created by the law itself, without any action by officers under the law, though a debt may be thus created. The liability of the tax payer is one thing; the creation and enforcement of a lien, especially against innocent parties, is another and very different thing. What I have said is of course conclusive of the case, and the other questions discussed by counsel need not be considered.

The demurrer is sustained.

TREAT, J., concurs.

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THE ST. LOUIS NATIONAL BANK v. BRINKHAM.

(District of Kansas. January, 1880.)

NATIONAL BANKS—JURISDICTION.—National banks are not authorized to institute suits in the federal courts out of the districts where they are established, when the amount in controversy does not exceed \$500.

Sterry & Sedgwick, for plaintiff.

Gardiner Lathrop, for defendant.

FOSTER, *District Judge*.—The plaintiff is a national bank, duly organized under the act of congress of June 3, 1864 (13 U. S. St. 99), and is established and doing business at the city of St. Louis, state of Missouri. It brings this action against the defendant, who is a citizen of the state of Kansas, to recover the sum of \$138.51, with interest from August 10, 1880, at ten per cent. per annum, for so much money collected by defendant for the use and benefit of plaintiff.

The defendant maintains that the plaintiff, being a national bank established out of this judicial district, this court has no jurisdiction.

The question is one upon which I have found no adjudicated case, and we have to look to the several acts of congress to determine the point at issue.

Involving, as it does, the right of national banks to sue in the federal courts out of the district in which they are established, the question presented is an interesting one. The amount in controversy in this case being less than \$500, that alone would defeat the jurisdiction, unless there is some law authorizing national banks to sue in the federal courts out of the district where they are established, and without regard to the sum in controversy.

Section 59 of the act of 1863, commonly known as the "Currency Act" (12 U. S. St. 681), reads as follows:

"That suits, actions and proceedings, by and against any

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association under this act, may be had in any circuit, district or territorial court of the United States, *held within the district in which such association may be established.*"

The act of June 3, 1864 (13 U. S. St. 116, § 57), re-enacts this section, omitting the words "by and," so it in terms only authorized proceedings in said courts against such associations and not by them. But the supreme court, in *Kennedy v. Gibson*, 8 Wall. 506, held that the omission of those words was accidental and not intentional, so the law remained in that respect as it was originally enacted. When the revision of the United States Statutes was had, this section was dropped from the currency act, title "National Banks," and was placed under the title "Judiciary," and there reads as follows:

"The circuit courts shall have original jurisdiction as follows: * * * * *

"*Tenth.* Of all suits by or against any banking association, *established in the district for which the court is held*, under any law providing for national banking associations." U. S. Rev. St. 110, 111.

It will be seen that this provision is in substance the same as that contained in the currency acts before mentioned, and very clearly limits the jurisdiction to suits by or against *banking associations established in the district where the court is held*, and that jurisdiction in no way depends upon the amount in controversy.

There is but one other provision of the law touching this question, and that is found in the Rev. St. (2d ed.) 903, under the title "National Banks," and among the enumerated powers conferred on these banks is the following: "To sue and be sued, complain and defend, in *any* court of law and equity *as fully as natural persons.*" This provision is copied *verbatim* from the currency acts of 1863 and 1864.

There is nothing in this enactment conferring any special jurisdiction on the federal courts in cases where national banks are parties; but these banks are placed on an equal footing with natural persons in all courts of law and equity.

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Now in the case of natural persons the citizenship of the parties and the amount in controversy in actions of this nature are both material, and are the controlling elements to jurisdiction in this court.

I need not decide or discuss the question whether a national bank organized under the law of congress and established in the state of Missouri is a citizen of that state under the rule recognizing corporations organized under the laws of a state as citizens of that state, for the purpose of suing and being sued in the federal courts. Even if the affirmative of that proposition could be maintained, there would still be a want of jurisdiction in this case, as the amount in controversy is not sufficient, and on that ground this case must be dismissed, and the costs paid by defendant refunded to him.

ELFELT v. HART.

(District of Minnesota. February, 1880.)

CONTRACT — FRAUD — EQUITABLE RELIEF.— It is not always necessary for the injured party, even when fraud taints the contract, to rescind it in order to resist its full operation. He may permit the contract to be amended so as to conform to fair dealing, and if, under the pleadings and the relief prayed, a court of chancery can enter a decree which would be just and fair, and in accordance with equity, it will do so.

Action removed from state court, and heard, without change of pleadings, by consent.

Gilman & Clough, for plaintiff.

Smith & Egan, for defendant.

NELSON, *District Judge*.—The plaintiff brings this action to compel the strict performance of the following agreement, alleging performance on his part and refusal by the defendant:

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"CONTRACT.

"PHILADELPHIA, December 24, 1878.

"This is to certify that I have agreed and will, upon receipt of mortgage for \$2,000 (two thousand dollars), with note, payable in three years, with interest at six per cent., payable semi-annually — the security of the above to be satisfactory — I will then give Abram S. Elfelt and Susan C. Elfelt a satisfaction of a mortgage dated July 20, 1876, of \$4,000, on the following described property, being a part of lot four (4), section twelve (12), township twenty-eight (28), range twenty-three (23), Ramsey county, Minnesota.

"ELEAZAR HART,

"OR ELL HART.

"Witness: F. A. HOYT."

The defendant, in his answer, charges the plaintiff with fraud and misrepresentation in procuring the agreement, and avers that he was intentionally misled by the plaintiff in regard to the value of the property upon which he held the mortgage, and which was agreed to be released and satisfied, and that the plaintiff intentionally concealed facts in reference to a contemplated sale of the property mortgaged, which was partially completed; and that these fraudulent practices of the plaintiff induced him to sign the agreement, which he alleges is void and of no binding force.

This is the substance of the answer, to which a special reply is interposed, disclaiming the fraud charged.

The facts are these: The defendant held the note of the plaintiff for \$4,000, with interest at six per cent., payable semi-annually, executed July 20, 1876, payable three years after date, and secured by a mortgage upon property described as follows, and denominated the "Cave property," to wit: Beginning at a point on the north boundary line of lot numbered four (4), of section numbered twelve (12), in town numbered twenty-eight (28), of range numbered twenty-three, distant six hundred and five and 54-100 feet west from the

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northeast corner of said lot; thence south three hundred and sixty feet to the west boundary of land of C. D. Elfelt; thence west, along said Elfelt's north boundary line, one hundred seventy-nine and 36-100 feet to his northwest corner; thence south, along the said C. D. Elfelt's west boundary line, to the Mississippi river; thence southwesterly up said river to the southwest corner of said lot four (4); thence north to the northwesterly corner of said lot four (4); thence east to the place of beginning—containing nineteen and one-half (19½) acres of land, more or less.

On December 11, 1878, the plaintiff entered into a contract for the sale of the mortgaged property to the St. Paul & Sioux City Railroad Company at the agreed sum of \$12,250—\$1,000 cash, and the residue payable in ninety days—the railroad company reserving the right to apply such an amount of the purchase money as may be necessary to pay all mortgage or other liens upon the property, and all taxes assessed thereon, save and except the taxes for 1878, which the railroad company were to pay. The amount of purchase money thus reserved would embrace the defendant's mortgage—amounting, principal and interest, at the date of the contract to about \$4,580—and pay the taxes (some \$900 or \$1,200) then delinquent. The plaintiff also received upon his contract, in addition to the \$1,000 therein provided, \$2,000 in cash, upon which, as he says, interest was to be paid by him, at the rate of ten per cent., until the balance of the purchase price was due.

The plaintiff, within ten days after the sale of the property was agreed upon, went to Philadelphia and called upon the defendant, about December 22, 1878, for the purpose of making some arrangement in reference to the mortgage.

It appears the defendant had been alarmed about the delinquent taxes upon the property, and its forfeiture to the state for non-payment, and had telegraphed the plaintiff about them in October, a few weeks previous to the sale of the land by him, and at this meeting the plaintiff complained that the defendant was unnecessarily exercised in regard to the taxes,

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and then made a proposition to him for settlement, and at a subsequent interview attempted to obtain the defendant's consent to a compromise which, in substance, was that the plaintiff would pay \$2,000 on the mortgage, if he could raise it or borrow it, and give a new note for \$2,000, payable in three years, giving a satisfactory security for the same by mortgage; and the defendant, in consideration therefor, should waive all accrued interest, and release the mortgage he then held from the property embraced in it, urging that on account of his financial condition he could make no better proposition, stating that "the property is all I have that I can use for the purpose of paying my indebtedness." On a subsequent meeting the plaintiff reiterated his former statement, and told the defendant "that in times like these I did not think I was asking too much to have the whole interest thrown off." The plaintiff also told the defendant that his ability to carry out the offer made to pay \$2,000 depended upon his ability to raise or borrow the money from a friend. The plaintiff finally induced the defendant to accept the proposition, and immediately went out to raise or borrow the money. He had in his possession a draft for \$2,000, and, proceeding to the office of Messrs. Young, Smythe, Field & Co., he exchanged his draft for their check on a Philadelphia bank, and, returning to the defendant, stated that he had borrowed the money (\$2,000) from a friend, and the agreement above set forth was executed by the defendant, and the \$2,000 check paid over by plaintiff. After obtaining the agreement to release the mortgage, the plaintiff, in his evidence, says: "I told the brother of Mr. E. Hart that I had already sold the property, and in reply to his question, why I had not told Mr. E. Hart, I answered I knew human nature too well; that, if I had done so, Mr. E. Hart would certainly not have made any reduction in interest."

The plaintiff, when he went to Philadelphia, obtained a statement of the amount of delinquent taxes, and, at the first interview, when the defendant said he was worried about the taxes, asked him "if, at the time he telegraphed about the

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taxes, he (plaintiff) had offered the property in payment of the mortgage, whether he would have accepted it," and received a negative answer from the defendant, who said he could not afford to. The plaintiff, as he says, made the inquiry for the purpose of drawing out the defendant and ascertaining how much he needed the money, and what he could accomplish in the way of having the interest deducted. The defendant was exercised about losing the property on account of unpaid taxes, and the plaintiff exhibited to him the tax statements, evidently for the purpose of increasing his anxiety, and repeatedly told him he could not pay the interest. And he withheld from him the information that the property was already sold, because, as he says, "I did not wish to tell him. If I had, he certainly would not have been disposed to deduct the interest, and that was my only reason." He also told him "that the property had passed to the state, and could only be redeemed by him or myself."

The defendant received the \$2,000, signed the agreement, and on the next day discovered that the property had been sold. When the plaintiff came to obtain the release or give a plat of the property, to be embraced in the new mortgage, the defendant declined to carry out the agreement, saying that he had been deceived and misled; but he made no offer to restore the \$2,000.

These are the principal facts as they appear chiefly from the plaintiff's testimony. Leaving out the testimony introduced by the defendant, and examining the case upon the plaintiff's evidence, I do not think he is entitled, in equity, to a strict performance of the agreement by the defendant.

It is impossible to read the plaintiff's testimony without arriving at the conclusion that he desired to make a compromise to his own advantage, without putting the defendant upon the same level, and not only concealed facts which, if known, would, in his own opinion, have influenced the defendant's action, but also induced him to believe that no redemption of

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the property for non-payment of taxes could be made from the state by any one but the defendant and himself, when, at the time, the property had been sold, and, by the terms of the sale, the railroad company were to reserve from the purchase price enough to pay taxes and redeem the property. Equity will not uphold such action, and no advantage can be obtained by such conduct.

While the counsel for plaintiff does not concede this, in terms, yet he urges that the defendant, having retained the \$2,000 received from the plaintiff under the contract, has affirmed it, and cannot, without placing the plaintiff in the position he occupied before the agreement was entered into, avail himself of facts which show that he was overreached and deceived, and that defendant cannot rescind the contract and retain the \$2,000 paid by the plaintiff, and, having retained it, has elected to affirm and abide by the contract.

The general doctrine is well stated that the party who has been induced to enter into a contract by fraud may either rescind or affirm it. If he rescinds, and has received something of value under the contract, he must restore the same to the other party. But it is not always necessary for the injured party, even where fraud taints a contract, to rescind it in order to resist its full operation. He may permit the contract to be amended so as to conform to fair dealing, and if, under the pleadings and the relief prayed, a court of chancery can enter a decree which would be just and fair, and in accordance with equity, it will do so. 2 Paige, 390; 1 Pet. 383.

The defendant had no knowledge of the sale of the property. He was anxious about the security of his loan, upon which no interest had been paid for over two years, and the land mortgaged forfeited to the state for non-payment of delinquent taxes. The plaintiff, while quieting his feelings about the taxes, was still making an effort to obtain a compromise with the defendant, and concealed information of the *status* of the property, and indirectly induced the defendant, through fear

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of loss, to consent to the compromise, while fair dealing required a frank statement from the plaintiff, so that the defendant would not be misled.

I think the defendant is entitled to the protection of the court and relief against the conclusive operation of the agreement, so far as it had the effect to remit the interest which had accrued upon the loan.

The defendant accepted the \$2,000, and now retains it. There is no reasonable objection to the mortgage security tendered for \$2,000, and this is the correct test, in my opinion, of "satisfactory security" mentioned in this agreement. The only matter really in dispute is the interest on the sum of \$4,000 up to the date of the agreement, December 24, 1878; and the plaintiff has executed the new note and mortgage for \$2,000, drawing interest at six per cent. from December 24, 1878, bearing date April 24, 1879, and the same is now tendered, in court, to the defendant. The court has the subject completely before it, to enable a final determination of the case, and, upon full consideration, has come to the conclusion that a decree should be entered in the case in favor of the plaintiff conditionally. It is therefore ordered, that a decree be entered adjudging that the defendant, upon the payment of the sum of \$700 by the plaintiff—which is the amount of interest upon the original loan of \$4,000, computed to the date of the new agreement, and the interest upon the \$2,000 note tendered, up to December 24, 1879—execute and deliver a release and satisfaction of the \$4,000 mortgage; *provided*, that the property described in the new mortgage is free from all incumbrances, including taxes, and the title in the grantors.

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WELLS v. THE SOUTHERN MINNESOTA RAILWAY COMPANY.

(District of Minnesota. March, 1880.)

RAILROAD—FORECLOSURE DECREE—TERMS “SERVANT” AND “EMPLOYE” CONSTRUED.—An act of the legislature of the state of Minnesota provided that in a foreclosure sale of a railroad, the court granting the foreclosure decree should provide in such decree, or otherwise, that the purchaser should “fully pay all sums due and owing by such * * * foreclosed railroad company to any servant or employe of such company.” *Held*, that the terms “servant” and “employe” did not include a secretary of such railroad company.

Cause tried before the court without a jury.

H. Emmons and *John B. Sanborn*, for plaintiff.

H. J. Horn, for defendant.

NELSON, *District Judge*.—The defendant company was organized after foreclosure and sale by the purchasers under an act of the legislature of the state of Minnesota, approved March 6, 1876.

This act contained the following proviso: “*Provided, however*, that such court (the court granting decree) shall provide in such foreclosure decree, or otherwise, that such purchaser or purchasers shall fully pay all sums due and owing by such defaulting and foreclosed railroad company to any servant or employe of such company.”

In 1872 a suit was commenced to foreclose the Southern Minnesota Railroad Company, as to part of its line, by the trustees, under certain mortgages given to secure the bonds issued by the company. On November 23, 1873, a receiver was appointed, who took possession of the mortgaged property. A decree of foreclosure was entered May 27, 1874, and on December 27, 1876, the decree was modified so as to allow a sale in the interest of second lien holders, subject to the lien of the first mortgage bondholders, and on sale being made,

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February 10, 1877, the defendant company was organized by the purchasers.

The plaintiff brings this suit to recover compensation at the rate of \$2,500 per annum, as secretary of the old company from June 1, 1874, at which time he claims he was elected, until June 19, 1876. At the time of his election the mortgaged property, including 167 miles of completed railroad, was in possession of the receiver, and the stockholders had no right to select their own agents for the management of the corporation; at least, the mortgaged property.

It is urged by the defendant that the act of March 6, 1876, which also contains this proviso, "that nothing herein contained shall be construed to change or impair the force of any decree of foreclosure heretofore made, or any of the terms or provisions thereof," relieves this defendant from the operation of this statute. It is unnecessary to decide this point, as, from the view entertained, another objection is fatal to a recovery by the plaintiff.

The secretary, under the by-laws, is an officer of the company, and salaries due officers are not the "sums due and owing any servant or employe," which the new organization are required to fully pay.

The legislature intended to provide for the unpaid wages due servants or employes; that is, operatives of the grade of servants "who have not a different, proper and distinctive appellation, such as officers and agents of the company." See 37 N. Y. R. and cases cited.

The charter of the old company, and the various acts amendatory and relating thereto, as well as the act of March 6, 1876, recognize the distinction between officers and employes, and the latter act refers to the secretary as an officer in the same section which contains the proviso; and it is apparent that when certain persons are in the act designated officers, and are not expressly named in the proviso which requires the payment of sums owing "servants or employes," they are excluded from its operation. The word "employe" following

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"servant," is descriptive of the persons intended to be paid, and excludes officials to whom are entrusted the management of the corporation business.

The officers of the company are its representatives, and, it may be said, are the official masters who direct and control the servants and employes. The former are appointed or elected, and are trustees (see 21 Wall. 624); the latter are hired, and are the subordinates of the former.

Judgment ordered for defendant.

MACK and others v. LANCASHIRE INS. CO.

(*Eastern District of Missouri.* January, 1880.)

PLEADING — ANSWER — GENERAL DENIAL.—Under the rules of pleading established by the state of Missouri, as modified by the act of 1875, affirmative matters of defense cannot be set up under a general denial.

Demurrer to answer.

Noble & Orrick, for plaintiffs.

O. B. Sansum and *B. Gratz Brown*, for defendant.

TREAT, *District Judge (orally)*.—There is a demurrer to the second count of the answer. In the course of the argument I directed the attention of counsel to a great many matters, not because this case involved all of the inquiries suggested, but to get their assistance in order that I might settle, as far as is practicable, in my own mind, the rules of pleading under the statute of the state. I should like to write an opinion as to the effect of the act of 1875, but I think I can state my views intelligibly. Here is an action under a fire policy containing many provisions. The only point under consideration is, how must the pleadings in this case, under the rules of pleading established by the state, as modified by the act of

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1875, be made up? The plaintiffs aver a contract under the terms of which they, having done certain things, are entitled to recover. There are warranties and other matters contained in the policy which constitute substantive matters of defense, and which the party can set up, whereby he can defeat the right of recovery. How shall those matters be set up?

The state statute of 1875 permits, instead of a specific denial as to each of the allegations, a general denial; but it does not, and I wish this distinction understood as the rule of the court, it does not permit, under a general denial, affirmative matters of defense to be set up. But if a party has an affirmative matter of defense to set up, as to a breach of warranty or other matters of that kind, which may occur under a policy, he must set it up affirmatively and separately. Let me illustrate: This is an ordinary form of a declaration on a fire policy; the policy is set out; the plaintiff avers loss, notice, proof of loss, etc. That is all he is required to do. The answer says: "And the said defendants, for further answer to the matters and things in the said plaintiff's petition stated and set forth, say that they admit that they are a body corporate under the laws of the United Kingdom of Great Britain and Ireland; they admit that they are prosecuting the business of fire insurance in the said state of Missouri; they admit that they made and delivered to the firm of Mack & Co. the several policies of insurance filed as exhibits 'A' and 'B' in said case, to insure the said firm" for the period of one year from 1878, terminating in 1879; "they admit that some goods of the description in the said several policies mentioned were damaged and consumed by fire on the fourth day of April, in the year A. D. 1879; they admit that the plaintiffs gave defendants due and proper notice of said fire; they admit that on the twelfth day of May, in the year last aforesaid, plaintiffs delivered to defendants certain papers called preliminary proofs of their alleged loss and damage, in the proofs stated and set forth, as they have in said petition stated and set forth; that they had in said building, at the time said fire oc-

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curred, goods of the description in said policy mentioned, the property of the plaintiffs, of the value of \$78,219.32; but defendants deny that the goods so damaged and consumed by said fire were of the value stated by the plaintiffs; and, on the contrary thereof, the defendants say that the whole value of said goods so consumed and damaged by said fire did not exceed the sum of \$48,000, of which the defendants then and there gave notice to plaintiffs,"—that is a defense *pro tanto*,—"and defendants offered to fix said loss and damage with the plaintiffs at the sum of \$48,000, but the plaintiffs refused to fix said loss and damage at said last mentioned sum, and persisted in claiming that at the time said fire occurred said goods were of the value of \$78,219.32; and the defendants say that as to all other matters and things in said petition stated and set forth the defendants deny the same, and each and every allegation thereof, in manner and form, as the same are in said petition stated and set forth." I presume that last clause was out of abundant caution. Every allegation is specifically admitted here on which the plaintiff's right to recover exists; and the issue is as to the amount.

"For a further and second defense to the matters and things in said petition stated and set forth, defendants say that said policies were made and delivered to plaintiffs upon condition that plaintiffs would faithfully observe, perform and keep certain conditions and stipulations in said policy stated and set forth."

[Here followed a large number of conditions common to fire policies.]

They are conditions precedent and subsequent, put into one general allegation. Now I hold that, under the practice of the state courts, no such pleading is admissible. It would be a very sad thing if it were. If a party has any defense on which he relies, the statute requires that he shall set it up as a matter of defense separately—each by itself. They go to defeat the right of recovery. Defendant admits that what the plaintiffs have stated is correct, but yet sets forth that there are other

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matters, despite what they have stated, which go to defeat their right of recovery. And each of those must be *separately* set up—not in gross. If the defendant will look at his pleading he will find that he has cut out of the policy not only matters going to defeat the right of recovery—such as provisions of warranty, etc., subsequent to the beginning of the policy—but also conditions precedent which are put in issue by his denial. Yet go a little deeper. “Defendants aver that, as to all of said stipulations and conditions, except the giving to defendants notice of said fire, plaintiffs have neglected and refused to perform and observe the same, and that all of said conditions and stipulations, except the giving of said notice of said fire to said defendants, remain unperformed, unobserved, and wholly disregarded by the plaintiffs.” What? The plaintiffs are entitled to recover on the face of the pleadings unless something else has happened which is an affirmative matter of defense. Now, in the defendant’s pleading all those matters of affirmative defense are mixed with the precedent matter under one count, and so “he has not done or performed *all*.” That is bad pleading.

Here is a specific matter of defense: “For a third and further defense to the matters and things in said petition stated and set forth, the defendants say that after the happening of the said alleged loss and damage to said goods, to wit, on the twelfth day of May, in the year A. D. 1879, the plaintiffs appeared in the city of St. Louis, before James P. Dawson, a notary public, duly commissioned and authorized to administer oaths in said city, and then and there plaintiffs, in writing, made preliminary proof of their said alleged loss and damage, and in said writings, among other things set forth, the plaintiffs stated that, at the time said alleged loss and damage happened as aforesaid, the plaintiffs had, in said building in said policies described, a large quantity of goods of the description mentioned, of the value of \$78,219.32, and that the same were consumed and damaged by said fire; and then and there plaintiffs signed their names to said preliminary proofs, and

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made oath before the said James P. Dawson that the matters and things in the said preliminary proofs stated and set forth were true, and then and there the plaintiffs delivered the said preliminary proofs of their said loss to the defendants, and demanded of the defendants payment of the sum of \$8,000, *pro rata*, as for a total loss of the said sum of \$78,000; whereas, in truth and in fact, the whole value of said goods at the time of the said loss and damage, happening as aforesaid, did not exceed the sum of \$48,000, as the plaintiffs then well knew. And the defendants aver that the plaintiffs made the said false statements in said preliminary proofs of said loss, and delivered the same to the defendants, with the fraudulent intent to induce defendants to believe that, at the time the alleged loss and damage happened as aforesaid, the said goods so damaged and consumed by said fire were of the value of \$78,000; and with the fraudulent intent to conceal from the defendants the actual value of the goods so damaged and consumed by said fire; and with the fraudulent intent to induce defendants to believe that they were bound to pay to the plaintiffs the sum of \$8,000; all of which defendants aver was an attempt by the plaintiffs to defraud the defendants in the premises, and is contrary to the terms of said policies."

That comes, evidently, if true, under one of these provisions of the policy which the party has selected, to wit: "Any fraud or attempted fraud by false swearing, etc., shall cause the forfeiture of the policy and be a complete bar." That is set up under that provision, I suppose.

The fourth defense is that the fire was caused by the plaintiffs themselves.

The only question raised by the demurrer is whether, in an action of this character, these conditions, precedent and subsequent, may be pleaded in gross.

The statute, as I interpret it, is this: You may put in a general denial as to each allegation on which the plaintiffs' right of recovery depends, instead of putting, as heretofore, a specific denial of each *seriatim*; but when you come to affirm-

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ative matters you must then specify each matter of defense according to the rules of pleading pertaining thereto. The demurrer is sustained.

HATHAWAY and others v. ST. PAUL FIRE & MARINE INS. CO.

(*Eastern District of Missouri.* January, 1880.)

MARINE INSURANCE — GOVERNMENT VESSEL — UNLICENSED PILOT — SEAWORTHINESS.— The mere fact that the officers navigating a government vessel are not licensed pilots, does not *prima facie* render a vessel unseaworthy under the warranties of marine insurance.

J. Chandler and *J. P. Ellis*, for plaintiffs.

Lee, Marshal & Barclay, for defendant.

Motion of defendant for new trial.

TREAT, *District Judge (orally).*— Concerning this case we have had very full conference, and I am now authorized by Brother KREKEL to announce that we have reached the same conclusion — that the motion for a new trial must be sustained. The character of the action was this: Certain army officers, being ordered from one post to another, proceeded, under an order from the war department, and shipped their private effects on a government vessel, going up the river. They took out insurance on those effects, the agent of the underwriter knowing that the property was to be shipped on this government vessel. Hence the contention seems to have been, at an early stage of the trial, whether the laws that require vessels to have licensed pilots are applicable to government vessels.

Testimony was received as to the unlicensed pilots navigating the vessel on which the disaster occurred, in order to ascertain whether the vessel was seaworthy, under the warranties of

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marine insurance. Judge KREKEL *originally* held that the mere fact of the officers being unlicensed did not *prima facie* render the vessel unseaworthy, but it was a matter of fact to be determined by the jury. But in the course of the trial and after various arguments the doctrine of contributory loss, and general and particular average, was urged to show that inasmuch as the government or a government vessel could not be compelled to contribute if there had been a jettison, for illustration, therefore the whole case was taken out of the body of the law of insurance as to seaworthiness. But this was not a case involving any such propositions. Yet his instructions were based on that theory. This contract was not between the government and the shipper, nor between the government and the underwriter, but between the shipper and the underwriter; and all the warranties that follow with regard to seaworthiness obtain. The mere fact that the government vessel does not have a licensed pilot, and is not bound to have one, does not raise presumptions one way or another; it becomes a simple matter of fact, and must be left to the jury. I wish to remark that in the motion for a new trial one of the grounds is newly discovered evidence, and that this new trial is not granted therefor. If that had been all, the motion would have been overruled; but it simply rests upon the point already stated. I am instructed to say, by Judge KREKEL, that for these reasons the motion must be sustained.

DOWNTON v. YAEGER MILLING CO.

Eastern District of Missouri. February, 1880.)

PATENT — MILLING PROCESS — USE OF ROLLS. — A patent for the manufacture of middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, is void for want of novelty and uncertainty, when such rolls are inadequate to produce the result described.

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W. G. Rainey and George Harding, for plaintiff.

G. M. Stewart and F. W. Cotzhausen, for defendant.

TREAT, *District Judge (orally)*.—I am prepared to announce my conclusion in the case of *Downton v. The Yaeger Milling Company*. This case was presented at great length last spring, and it was announced to counsel at that time that if the court was compelled, as matters then stood, to decide the case, it would have to decide it in a certain way, but it would be more satisfactory if on certain points it could be more fully presented. That has been done, and very ably. One of the points as to which the court was troubled was whether, under the existing state of the art, this being a process patent, there was any novelty in it. Second, was the patent itself sufficiently specific in its terms to make it practicable, or, in other words, patentable in the form pursued.

It is not proposed this morning to go through the milling literature with regard to these matters, as the various stages of all the matters involved were fully considered at the time of the hearing of the milling cases before Judges DILLON, NELSON, and myself. We were then very fully instructed as to this new process, and also as to the state of the art when the new process arose, and the conclusions announced in that case are very familiar to the counsel in this case, and to the milling public generally, by this time.

Now the mills using this new process interject rolls at various stages in connection with grinding, and, after purifying, regrinding the purified middlings. Counsel were asked whether they construed this particular patent as covering *any* use of rolls on purified middlings at any stage of the successive grindings, or whether, under their construction of the patent, it was a use of rolls, one or more, at a stage intermediate the first and second grindings. Counsel were understood to say that the interjection of such rolls at any one of these successive stages was within the terms of the patent. The impor-

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tance of that, if the testimony is understood, relates to the question of infringement.

There was a controversy at an early stage of this case, growing out of the transactions between Downton, Allis & Co., of Milwaukee, and this defendant, Yaeger. Judge DILLON and myself disagreed in opinion with regard to the effect of the paper transactions involved, but his ruling with regard to the matter was necessarily the ruling in the case. He held that if there was an infringement of this patent then the defendant must answer, except as to the two chilled iron rolls interposed between the first and second grindings according to the terms of the patent, because Allis & Co., who were to some extent assignees in this matter, made those rolls according to Downton's description, Downton himself superintending the whole matter and putting them in the mill; the contention being on the part of Downton that he informed these parties who had bought these rolls, which came under a subsequent patent, that whilst he put them in, they must give him a royalty under his process patent, and hence any use of the rolls by those parties did not exonerate them from a royalty therefor. Judge DILLON and I concurred as to those two, as they were supposed to have been put there for some purpose. They were put there by the plaintiff, and under his very patent, and if it is said that they were put there merely to clog the machinery and for nothing involving a purpose, such a proposition cannot be maintained.

Now the court is brought, for the purposes of this case, to the construction of this patent. It has been read and reread very carefully. If there is anything in it that is patentable, and involves novelty, it is not the use of rolls at every stage of this process — for all the Minnesota mills had been using it before, and in Europe and Missouri the same thing had been practiced for a long series of years — but it was the interjection of rolls between the first and second grindings, whereby certain effects would be produced; that is, such use flattens the germ or embryonic part of the berry, and also the pellicle, by

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a crushing instead of a grinding process. It is very obvious to any one who has looked into this subject that if this grinding process is continued, whereby all the matter of the berry, including the germ — which seems to be the most obnoxious part of the whole — is mixed, then, instead of getting a first quality of flour, you have flour that is somewhat inferior in its character; for this waxy germ, in itself, has no especial nutritive property, but damages the flour through various causes. Hence, if you can take that out in the first instance, so that it shall not be ground into the body of the flour, it is certainly a most beneficial effect. To do it you must crush, not grind, for this little embryonic particle is so very minute that, unless you flatten it, it may, under trituration or grinding, pass into the middlings, and if you grind the middlings it will go into the body of the flour. So that the true construction, and the only construction, that will uphold this patent is the interjection of those rolls between the first and second grindings of the purified middlings. By that means the fluffy matter would be thrown off, leaving the tailings to be operated upon thereafter.

Then comes the next question: If that be the true reading of the patent, did this defendant use anything but the two chilled iron rolls at that stage of the process? The evidence is very uncertain on that point. Some say that under the Wegman patent porcelain rolls were used at various stages. But no matter as to that. This question is one to which the court asked particular attention, namely: here is a statement that by the use of rolls in a particular stage of this process certain beneficial results can be had; that is, a flattening of the germ so that it will not pass through the bolts. Now is that to be construed in this way; that any device that might at any time thereafter be had, whereby such a result may occur, is covered by this patent? It seems that anterior to this patent Mowbray and others had been using rolls, and in that very stage of the process, but the contention was that the particular rolls that they were using did not effect the end to the desired extent,

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and hence, subsequent to this process patent, it became necessary to have some rolls invented which would effect the end.

Now, it is an elemental proposition as to patents that they shall be so clear that by ordinary means they can be worked out by a person skilled in the art. It is clear that this patent could not be operated by any method until some person invented rolls, which, while they should not be corrugated, because that would be as bad as the mill-stones in tritulating, but should be smooth, and yet have sufficient grip and be of sufficient hardness; and that was not all, they must have the same diameters and work with equal speed, instead of differential speed. Neither of which was suggested in the patent.

To summarize, the claim of the patent is specific: "The herein described process of manufacturing middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth." Those purposes, as the specification states, are mainly for flattening the germ. That object was effected by the interposition of rolls at that particular stage of the process. Rolls at other stages of the milling process had been previously used, and even rolls by Mowbray at that particular stage; hence, if the patent is to be construed by its terms as covering the use of rolls at any stage of the milling process, it had been long anticipated prior thereto. If it is to be restricted to the use of rolls at the particular stage mentioned, then, so far as this case is concerned, the plaintiff is estopped, because he himself, as heretofore decided, placed the only rolls used at that stage in the defendant's mill.

On the other hand, irrespective of the question of estoppel, if the patent is for a process to be effected without any known means of accomplishing the result, but requiring inventive faculty, whereby rolls to accomplish the purposes, and their modes of operation, were to be determined by new inventions or discoveries, then the patent does not furnish to any one, as then skilled in the art, means whereby the beneficial end could

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be accomplished. No one in the then existing state of the art could, by the use of any rolls known, or by any modes of operating the same, have effected the designed end. Consequently, to uphold this patent for a process which would have been ineffective without some inventions thereafter had, would be to block the path to all future progress in the art of milling.

The necessary result is that I dismiss the bill, the patent being void for want of novelty, and uncertainty.

LIGGETT & MYERS TOBACCO CO. v. MILLER and others.

(*Eastern District of Missouri.* March, 1880.)

PATENT—INTERFERING PATENTS—SERVICE OF NOTICE OUTSIDE OF DISTRICT.—In proceedings for relief against the owners of an interfering patent, under section 4918 of the Revised Statutes, no provision is made for the service of notice upon parties outside of the district in which such proceedings have been instituted.

S. S. Boyd, for complainant.

Hatch & Stem and *Winchester & Beattie*, for defendants.

MCCRARY, *Circuit Judge (orally)*.—This is a proceeding under section 4918 of the Revised Statutes of the United States, touching interfering patents. I will read the section in full:

“Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void, in whole or in part, or inoperative or invalid in any particular part of the United

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States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit, and those deriving title under them subsequent to the rendition of such judgment."

When this case was brought to our attention, on the second day of February last, we held that the proceeding contemplated by this section was an ordinary proceeding in chancery; that it was not a summary proceeding, but an adversary proceeding, in which the party must file the usual bill in chancery and issue the subpoena required by the chancery practice. In accordance with that ruling counsel amended his bill so as to make it conform to the chancery practice, and issued the usual subpoena, which has been served on the defendants who were found within the district. He furthermore issued a notice which has been served on parties outside of the district. The notice is as follows, addressed to the several defendants:

"Please take notice that we have this day filed an amended bill in equity in the above entitled cause, under section 4918, Rev. St. of the United States, praying, among other things, that said court may adjudge and declare Re-issue Letters Patent, No. 8060, granted the above named defendants, January 29, A. D. 1878, for 'Improvement in Finishing Tobacco Plugs,' to be utterly null and void.

"Respectfully, etc.,

"LIGGETT & MYERS TOBACCO Co.

"By SAM'L S. BOYD, Solicitor."

The question presented now is, and it is presented really for the second time, whether in such a case as this the complainant may depart from the usual chancery practice, and issue a notice of this character to be served outside of the district.

Counsel has very properly, I think, brought the matter again before us, for the reason that it was considered very hurriedly on the former occasion, and for the further reason that he ought to have the question presented in a shape to be reviewed by the supreme court. But, on a reconsideration of the whole

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subject, we have reached the same conclusion announced before. No law of the United States makes provision for the service of process outside of the district. On the contrary, it is expressly provided, by section 739 of the Revised Statutes, that, "except in the cases provided in the next three sections, no person shall be arrested in one district, for trial in another, in any civil action before a circuit or district court; and except in the said cases, and the cases provided for by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ."

This is not a case that comes within any exception to that rule. The exceptions are cases where the subject-matter is within the jurisdiction of the court. Now I do not think that section 4918 is intended to change the practice so far as to permit this court, by the issuing of a notice of this character, or any other process, to bring before it citizens from any and every part of the United States, to have their rights adjudicated here. On the contrary, I think the section clearly contemplates that the ordinary course of equity proceedings shall be pursued, and that in many cases it will occur that only part of the persons interested will be brought before the court; for it provides, as you will observe, for a judgment which "may declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented;" and it further provides that "no such judgment or adjudication shall affect the right of any person, except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

Now, the consequence of giving the statute the construction contended for by counsel for the complainant would, it seems to us, be very serious. This is a case of interference. The owner of a patent, residing in Maine, may, according to the

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construction contended for, file his bill, and by issuing notice upon his own motion, and having it served, may bring before the court in that state parties residing in California.

The parties interested in patents are often very numerous; they may be found in every state in the Union, and may be, by such a proceeding as this, brought to any particular place where a complainant may see fit to file his bill, if the construction claimed is sustained. Besides, if one circuit court possesses this extraordinary power, every other circuit court possesses it, and the result of allowing this proceeding might be the institution of ten, twenty or fifty suits, in as many different districts, all involving the same controversy and against the same persons. We hold, therefore, that the "notice to adverse parties, and other due proceedings had according to the course of equity," provided for by this statute, means nothing more than the subpoena and other process authorized by our chancery rules and practice.

For these reasons we adhere to our former ruling; but as the question is important, I am glad that counsel has presented it again, so that it may be reviewed, in case the supreme court is called to pass upon this case.

The motion is sustained.

TREAT, J., concurred.

LEVI v. COLUMBIA LIFE INS. CO.

(Eastern District of Missouri. March, 1880.)

JURISDICTION — EXECUTION — JUDGMENT IN FEDERAL COURT — PROPERTY IN CUSTODY OF STATE COURT.— Where, under the "Insurance Act" of the state of Missouri, proceedings have been instituted in the state court against an insurance company, which finally result in the dissolution and administration of the affairs of that company, all intermediate proceedings must be finally disposed of in that tribunal, even though a valid and subsisting judgment was obtained in the federal court against the company pending such administration.

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Motion for execution and order on receiver of an insurance company, dissolved under proceedings in a state court, for the payment of a judgment obtained against such insurance company pending said proceedings in the state court.

Given Campbell, for plaintiff.

Pope & McGinness, for defendant.

TREAT, *District Judge (orally)*.—M. D. Lewis, public administrator, has filed his petition to have the judgment in favor of Levi revived; and notice thereof having been served on the receiver of the defendant (dissolved), the latter appeared, and, not objecting thereto, it was adjudged that said judgment be revived in the name of said administrator, Lewis. Thereupon a rule was entered upon said receiver to show cause why he should not pay the amount of said judgment, or why execution should not issue against the realty or assets of said dissolved corporation. To that rule said receiver has made an answer to the following effect, viz.: That said corporation was a Missouri corporation; that on February 22, 1877, the superintendent of the insurance department filed in the proper state court a petition for the dissolution, etc., of said corporation; that on February 23, 1877, a preliminary injunction was issued; that on August 7, 1877, Alexander was appointed temporary receiver, and that on October 17, 1877, said corporation was dissolved by a decree entered in said proceedings.

The other averments in the return pertain to what has been done under said decree towards winding up the affairs of said corporation, among which it is stated that plaintiff's attorney presented the demand in question for allowance by the referee as a preferred claim, etc.

The suit in this court, which ripened into a judgment, was brought after proceedings had been commenced in the state court to wind up the corporation named, and although judgment was rendered on plaintiff's demand, before the decree of

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dissolution was had, yet the decree operated to put *in custodia legis* of the state tribunal all the assets of the corporation, as existing on the day of petition filed. Hence, the judgment of the plaintiff, though valid and subsisting, must be treated like any other demand duly proved, subject to be allowed as such, on presentation to the referee in the state court. This court cannot interfere with the jurisdiction and proceedings of the state court and its officers, who are duly administering the assets of said dissolved corporation.

It may be very difficult to reconcile the several decisions of the United States supreme court concerning such questions, especially in the light of the two cases of *Payne v. Hook*; yet the current of its rulings, and the general principle to be applied, is clear, viz.: that whatever court first obtains jurisdiction of the *res*, or assets of a defendant, must proceed therewith uninterrupted by any other tribunal. Were this not so, unseemly conflicts and constant discord would result.

The question raised here is not a new one. Twenty odd years ago the circuit and district courts of the United States had to meet the question, and they determined with general uniformity that where the *res* or property was in the custody or possession of the state tribunals they could not be interfered with. Some twenty-five years ago, cases went up from Michigan and Pennsylvania, in which that question was presented to the supreme court of the United States. After argument, a re-argument was ordered, which ripened into judgment in the case of *Taylor v. Carryl*, 20 How. 583. The result was this ruling: That, considering the peculiar character of our government, whatever rightful jurisdiction first obtained custody of these matters, it must, without interruption by other courts, be permitted to proceed.

For instance, in a case of admiralty, when under the various state laws, by attachment or otherwise, the *res* is in the custody of the state authorities, and a warrant is issued in admiralty, where there is exclusive jurisdiction as to some matters (a stronger case than Mr. Campbell's), what shall be

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done with that process? Shall a United States court take the *res* out of the custody of the state officers? No. So said this court, and the supreme court, after re-argument. And the state court accordingly proceeded with the matter. If, subsequent thereto, the rights of the parties having been duly considered, a libellant comes, having a prior lien, and pursues the property in the hands of the purchaser, his lien will be recognized and enforced. So stands the body of the admiralty law up to this hour.

Now, *vice versa*, suppose there was a receiver of this court in the custody and administration of certain affairs, and the state courts attempted to interfere with such administration, this court would repel any such interference, and any person who, despite the lawful custody of the officers of this court, should attempt to interfere with such administration, would be in contempt. But, waiving that, whether they would or would not, this court would insist upon its officers administering the estate in due form. On the other hand, if the state court is lawfully in possession of these matters it must go on in its course without interference. They are independent jurisdictions for the respective purposes.

With these ancillary matters stated, you may present your demand for and pursue the remedies in one or the other tribunals as you please. Further, take the case in hand. There is an act to be examined — the insurance act of this state. I have examined a copy of the insurance laws with reference to the force and effect of the act. In a few words it is this: Under the particular laws of the state, under certain circumstances, the state courts should pass preliminarily on certain matters, which may ultimately ripen into a decree for settlement of all the affairs relating to a certain matter or company. Now, if federal courts or state courts elsewhere may proceed by their judgments to strike through such a settlement, which is intended for the equal distribution of all the assets of the company, the settlement may be ultimately destroyed.

Such a state of facts would defeat the very purposes of the

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statute. It would result in a race of diligence, whereby, through a particular jurisdiction — it may be the state or federal courts, from one end of the Union to the other — priorities may be obtained, and the intention that the assets in the hands of the receiver for the purpose of equal distribution, among all of the demands against the company, be entirely defeated. Consequently, when proceedings are instituted under the insurance act of the state, with regard to a Missouri corporation, the whole matter passes into the jurisdiction and cognizance of the state court, and whatever occurs subsequently thereto, with regard to such administration, must pursue such course as the court having custody thereof may determine as right and proper. If an error is committed the ordinary course must be pursued.

Hence, without going further back than the case of *Taylor v. Carryl*, down to the present hour, with the exceptions of the two cases of *Payne v. Hook*, 7 Wall. 425; 14 Wall. 252, there has been an unbroken current of authority that a federal court shall not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court. *Vice versa*, no state court can interfere with the custody and administration of the *res* which a federal court has lawfully in custody. Neither shall interfere with the respective officers of the other, to wit: This court will not tolerate interference with a receiver appointed by it; and, on the other hand, will not interfere with a receiver appointed by a state court. Thus harmony is wrought in the administration of affairs. If there should be a question arising after the administration, on the other hand, of the state or federal tribunals, through its receiver, not coupled with or growing out of the administration of the law through the respective courts pertaining to the conduct of its officers, such subsequent question might be considered; but not pending the litigation.

Hence it should be understood that the naked and broad proposition is decided by this court in this particular case, that where, under the state insurance act, proceedings have

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been instituted against a company which finally ripen into the administration of the affairs of that company, all intermediate proceedings must be finally disposed of in that tribunal, even though a judgment were rendered here pending the administration. In this case judgment was rendered. It stands as a valid and subsisting judgment, subject, however, in its order of distribution, to the rules pertaining to the administration of these affairs under the insurance act of the state.

Suppose, under the insurance law, the case against this company had been finally dismissed in the state court, this plaintiff would then have had his lien according to its order of priority. But he took his judgment subject to the determination of the state court, whether it should render a final decree of dissolution relating back to the date of the proceedings. Consequently the proceedings here are not void; it is a valid judgment, to await its order in that court like any other judgment. If this is understood, that is all of this case. In other words, having entered of record the revival of this matter in the name of Lewis, administrator, the petition is dismissed as to all other matters, and the party remitted to his proceedings in the state court, so far as this case is concerned.

Now, a few words should be said with regard to the two cases of *Payne v. Hook*, *supra*. In the second case the supreme court of the United States, without expressly saying that it had overruled itself with regard to the matters involved in those cases, practically did so. Mr. Campbell called the attention of the court to that matter. The case was a peculiar one. This court was reversed, but the reason for the reversal, if it becomes this court to make any comments, are not satisfactory. Suffice it, however, that there was a reversal of the judgment. This court pursued the mandate of the supreme court in letter and spirit, and then the case went up a second time and that court shifted its ground. Hence, whether the case of *Payne v. Hook* is authority for anything is a question.

The principle involved was simply this: One of many distributees of an estate, before final settlement or determination

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of the affairs of the estate in the proper tribunal, to wit, a probate court, filed a bill in this court against the administrator and his sureties, among other things, to charge him with the amount that would come to her, as distributee, on a final settlement and determination of the questions which were properly to be determined by the probate court. This court held that it could not be done. The supreme court said it could be done, because this particular distributee was a resident of a state other than the state of Missouri. Now if that could be done in the case of a distributee, why could it not be done in the case of a creditor, and what would become of the probate administrations throughout the Union? If there happened to be a non-resident creditor or distributee who chose to proceed in a federal tribunal, then there would be brought into the federal courts the administration of every such estate from one end of the Union to the other, and the probate laws would become of no force.

The supreme court said: Under the federal constitution laws have been passed that where there are citizens of different states the matter may be adjudicated in the federal courts, whether probate administration is involved or not. It is the duty of the courts, accordingly, to pass upon the matter, and render judgment. Another question was presented, namely: There was a defect of parties; only a part of the distributees, not all, were before the court; hence, in the opinion of this court, the ground was well taken as to the defect of parties. The supreme court took a different view. Suppose, as was held by this court, that one distributee, and there may be a large number, comes in and takes out of the administration of the probate court the settlement of all the affairs pertaining to a particular estate, and it is determined by a proceeding in this court that he is entitled to a given sum of money, remaining after payment of all the lawful demands against the estate, being his *pro rata*. The next day another distributee comes in, and so on, *ad infinitum*. He is not a party to the original proceeding; he is an entirely different party, *res inter alios acta*.

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The supreme court said, in the first case of *Payne v. Hook*: Very well; judgment having been rendered for an accounting in one case, the other distributees may come in by a supplemental proceeding and become parties thereto, whereby, on final determination and settlement, the gross amount subject to distribution may be determined and then divided. This court pursued that course under the mandate of the supreme court. The other distributees came in in a supplemental way. Objections were interposed, and the matter again went to the supreme court, and they then said that was entirely wrong; it could not be done.

It may be considered that the two cases of *Payne v. Hook* decide nothing. They are not in accord with each other, nor with the uniform rulings of the supreme court of the United States theretofore. Hence the broad principle remains—under the constitution and laws of the country, and of the rulings of the supreme court of the United States in connection therewith—that whatever tribunal, state or federal, lawfully has possession of the *res* of an estate, it shall proceed to the full administration thereof, without interference by another tribunal. The state courts are not bound to accept any orders of the federal courts in regard to their mode of determining matters rightfully before them; just as this court would repel any interference by the state courts with the *res* or an estate in its custody. It must suffice, therefore, that the motion for execution and an order on the receiver of the state court must be denied.

The plaintiff can take such action on his judgment, for the allowance of the same by the state court, as he may be advised.

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UNITED STATES v. BIEBUSCH.

(*Eastern District of Missouri. March, 1880.*)

1. PRACTICE—RULINGS OF DISTRICT JUDGE WHEN HOLDING THE CIRCUIT COURT —WHEN REVIEWABLE BY CIRCUIT JUDGE.—It is well settled in the eighth circuit that the rulings of the district judge, while holding the circuit court, are not subject to review in the same court, by the circuit judge or justice, and the circuit judge will only sit to hear motions for new trials in cases tried in his absence, when the district judge so desires and requests it.
2. INDICTMENT—WITHDRAWAL OF COUNT—EVIDENCE.—The withdrawal of a count in an indictment does not render the evidence offered incompetent, so far as it is legally applicable to the counts of the indictment not withdrawn.
3. SAME — FRAUDULENT SALE — FRAUDULENT POSSESSION — EVIDENCE. Evidence of a fraudulent sale is competent to support a charge of fraudulent possession under a count in an indictment.
4. WITNESS—INFAMY—PROOF OF CONVICTION.—Conviction of an infamous crime must be shown by the record, and does not affect the competency of the testimony of a witness.
5. JUDGMENT—ATTESTATION OF RECORD—REV. ST. § 905 — CERTIFICATE. The record of a judgment in the state of Illinois is not admissible in evidence in the United States circuit court of Missouri unless attested in accordance with section 905 of the Rev. St. and duly certified.
6. WITNESS—INFAMY—CONFIRMATION OF TESTIMONY.—Evidence is admissible in confirmation of the testimony of a person who has been convicted of an infamous crime, in such and so many parts of his narrative as may satisfy the jury that he has told the truth, but should not, perhaps, be extended to such acts in the narrative as are generally well known.

Motion for a new trial before the circuit judge, in an indictment tried by the district judge while holding the circuit court in the absence of the circuit judge.

Indictment. Motion for new trial.

Mr. Drummond, Assistant United States Attorney, for the United States.

Mr. Krum and *Mr. Simmons*, for defendant.

McCRARY, *Circuit Judge*.—In this case and one other I have at this term heard, with the district judge, motions for

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new trials in cases tried before him when holding alone the circuit court. I have done so at his request, and only for the purpose of advising with and assisting him. It is well settled in this circuit that the rulings of the district judge while holding the circuit court are not subject to be reviewed in the same court, either by the circuit judge or the circuit justice. I make this announcement so that it may be understood that I am not to be expected, as a rule, to entertain motions for new trials in cases tried in my absence by the district judge, and that I will only sit with the district judge in hearing such matters when he desires and requests it. It is not enough that he does not object or consents. *Appleton v. Smith*, 1 Dillon, 202. In this case, however, I have, at the request of the district judge, considered carefully the questions raised by counsel for defendant in support of their motion for a new trial, and am prepared to announce my concurrence in his rulings.

The questions involved are, I think, sufficiently important to justify me in stating the legal propositions upon which we are agreed, and which are conclusive of the motion. They are as follows:

1. Evidence offered in support of an indictment, containing several counts, goes to the jury in support of each and all the counts to which it is relevant, and so far as competent; and where one of several counts is withdrawn after evidence has been offered, it is proper for the court to direct the jury to consider such evidence, under counts not withdrawn, in so far as it is legally applicable to them.

2. In an indictment, charging in one count possession of counterfeit coin, with intent to defraud, etc., and in another count charging a fraudulent sale of such coin, evidence of fraudulent possession and sale may be retained as supporting the first named count after the second has been withdrawn from the jury, though the person to whom such sale is made is not named in the indictment. A fraudulent sale to any person, whether named in the indictment or not, is competent evidence to support the charge of fraudulent possession.

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3. At common law a person convicted of an infamous crime was rendered incompetent as a witness, but in England and in most of the states of the Union the disqualification of infamy has been removed, and a conviction may be shown only to affect credibility. Whart. on Ev. § 397. The tendency of courts and legislatures is now strongly in the direction of the doctrine that all persons of sufficient intelligence should be accepted as competent to testify, leaving to the jury, and not to the court, the question of credibility. In the courts of the United States, as well as in those of many of the states, a defendant in a criminal case may now testify in his own behalf. If, however, a conviction of an infamous crime is to be held to exclude a witness, it is clear that such conviction must be shown by the record. "The record," says Mr. Greenleaf, "is required as sole evidence of his guilt, no other proof being admitted of the crime, not only because of the great injustice of trying the guilt of a third person in a case in which he is not a party, but, also, lest in the multiplication of the issues to be tried the principal case should be lost sight of and the administration of justice should be frustrated." 1 Greenl. Ev. § 372. "It is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. * * * If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved if the evidence be objected to), or by his plea of 'guilty,' which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility." Id. § 375.

4. The record of a judgment in the state of Illinois by a court of that state, to be admitted in evidence here, must be attested in the manner provided by section 905 of the Revised Statutes, and the certificate must show that the person signing it as judge was, at the time of so signing, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record. *Lothrop v. Blake*, 3 Barr. 495; *Stephen-*

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son v. Bannister, 3 Bibb. 369; *Kirkland v. Smith*, 2 Martin (N. S.), 497; *Stewart v. Gray*, Hemp, 94; *Catlin v. Underhill*, 4 McLean, 199; *Erb v. Scott*, 2 Harris, 22.

Our attention has been called to the case of *Bennett v. Bennett*, 1 Deady, 307, where the opinion is expressed that the statute above cited concerning the authentication of judicial records does not apply to the authentication of a state record in the federal courts. I have carefully considered the reasoning of the learned judge in that case, and find myself unable to concur therein. In numerous reported cases where transcripts of judgments in state courts have been offered in evidence in courts of the United States, the applicability of the statute has been taken for granted. (See cases cited under section 905, Revised Statutes.) And in no case, so far as I am advised, except the one above cited, has the question been raised. It is said that the act was passed in pursuance of article 4, section 1 of the constitution, which declares that full faith and credit shall be given in each state to the judicial records, etc., of every other state. And it is argued that congress must be presumed to have enacted the law in question for the sole purpose of carrying into effect this constitutional provision. But it must be borne in mind that congress has the general power to regulate the mode of proof and procedure in the national courts, and that the act in question may have been intended to accomplish this end. Whether it was so intended or not must depend upon the language of the statute, and this appears to me to be entirely clear. It provides that "the records and judicial proceedings of the courts of any state or territory * * * shall be proved or admitted in any other court within the United States by the attestation of the clerk," etc. The language, "any other court within the United States," is very comprehensive, and must be held to include both state and national courts. Congress having full power under the constitution to regulate the mode of proof of judicial records of state courts, in all other courts, both state and federal, has seen fit to exercise it in the enactment of a single statute. It matters not that the power

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of congress to pass the act may have been derived from several provisions of the constitution.

5. Upon the question raised upon this motion as to what evidence may be received in corroboration of the testimony of a witness who is shown to be infamous, the authorities are not perfectly agreed. I am, however, prepared to accept, as applicable here, the rule laid down by Chief Baron Jox in his work on the evidence of accomplices, pp. 98, 99, and which is as follows: "The confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observation of the judge." See 1 Greenleaf Ev. § 381, note 1. This is, I think, a safe and sound rule, with, perhaps, a single modification. The corroborating evidence should not be extended to such facts in the witness' narrative as are generally known, but should be confined to those matters which, whether in themselves material to conviction or not, are seen to be well calculated to strengthen and confirm the truth of his story.

 In re WELGE.

(Eastern District of Missouri. February, 1880.)

BANKRUPTCY — ASSIGNEE — ALLOWANCE FOR SERVICES AS ATTORNEY. —

The court in its discretion can allow an assignee in bankruptcy additional compensation for his services as an attorney at law in the conduct of necessary litigation for the preservation of the bankrupt estate.

Motion to set aside extra allowance to an assignee in bankruptcy for services rendered as an attorney at law.

David Goldsmith, assignee, *in propria persona*.

S. N. Holiday, for creditors.

In re Welge.

TREAT, District Judge. The motion in this case raises the legal question whether under any circumstances an assignee in bankruptcy can be allowed, by way of additional compensation, any sum whatever for his services as attorney in the conduct of necessary litigation for the preservation of a bankrupt estate. The doctrine of trusts forbids the trustee to speculate for his own benefit, but leaves to the chancellor to determine what the measure of his compensation should be.

An assignee, with the consent of the court, can have an attorney appointed, to whom proper fees are allowable. Why, then, if the assignee is a competent attorney, should he not act, and thus save the estate the expense of double charges? If some one other than himself were called into the case the needed information would have to be imparted, and even then an inadequate view of what is requisite might be presented.

Experience has shown that when laymen have been assignees they, from lack of legal information, have often turned over, practically, the administration of the respective estates to some attorney, and then claimed the statutory compensation for their services as assignees, and fees for their attorneys. This court has resolutely refused to allow such double compensation, for the assignee is compelled to perform all duties pertaining to his trust for the compensation allowed, and not to employ an attorney except in special cases. If extraordinary services are required and performed, an extra allowance is permitted; and why, if those extraordinary services are such as need a skilled attorney, should he not, if he performs those services, be allowed compensation therefor?

In this case it is not disputed that the assignee, being a competent attorney, and having no assets for expenses of litigation, did institute and successfully pursue needed litigation, whereby the sole assets were secured. If he did the professional work why should he not be allowed therefor, at least, the amount he would have had to pay some other attorney, whom he would have been compelled to instruct as to details?

There is no danger of abuse in such matters, because the

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allowance is to be made by the court, just as in trusts generally, where the chancellor passes on the true measure of compensation. Here the work was well and successfully done, and the compensation reasonable. Indeed, but for the hazard the assignee took no assets would have existed.

The motion to set aside the allowance is overruled, and the extra allowance granted, subject to the approval of the circuit judge.

BRECHER, Assignee, v. Fox and another.

(District of Minnesota. February, 1890.)

BANKRUPTCY — PARTNERSHIP — MISAPPROPRIATION BY MEMBER OF INSOLVENT FIRM OF PARTNERSHIP ASSETS.

Final hearing upon pleadings and proofs in suit in equity.

Rogers & Rogers, for complainant.

Amos Cogswell, for defendant Emeline Fox.

NELSON, *District Judge*.—The complainant, who is assignee in bankruptcy of Melvin & Fox, brought this suit against J. R. Fox, one of the bankrupts, and Emeline Fox, his wife. The prayer of the bill is, in substance, that the sum of \$624 be declared to be a specific lien and charge upon certain property, to wit, lot seventeen (17), in block number seventeen (17), in the city of Owatonna, in this district, and that the same be sold under the directions of this court, and out of the proceeds the said sum be paid to the assignee, and for general relief. J. R. Fox and William S. Melvin were adjudged bankrupts on February 20, 1878, and the complainant was appointed assignee April 1, 1878, and duly qualified. It is clearly proved or admitted that on January 22, 1878, J. R. Fox, being at that time insolvent, paid out of his estate, or his interest in the assets of the firm of Melvin & Fox, which had come to him from the

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sale of firm property, without liquidating the firm indebtedness, a debt secured by mortgage upon the property above described, owned by his wife, the defendant Emeline Fox, and the mortgage was then cancelled of record, and the title to the property now remains in her.

The answer avers that the mortgage debt was paid by Fox in good faith.

The only point in controversy is, could J. R. Fox rightfully use the proceeds of the firm property which had been assigned to him on a division, with the consent of his partner, for the purpose of paying this debt and discharging the lien upon his wife's property, while firm indebtedness to a large amount existed at the time, and the firm, and the individual members thereof, were insolvent? The facts bring this fairly within the adjudicated cases, and the assignee is entitled to the sum claimed as misappropriated. 16 B. R. 425; Id. 181; 5 Otto, 3; 7 Otto, 304.

A decree will be entered as prayed for, unless within thirty days the defendants, or either of them, pay over \$624 to assignee. The costs will be divided.

CHAPMAN, Executor, etc., v. BORER, Administrator, etc., and others.

(*District of Minnesota.* February, 1880.)

JURISDICTION — CONCURRENT JURISDICTION OF THE CIRCUIT AND PROBATE COURTS — PAYNE v. HOOK, 7 WALL. 426, FOLLOWED.— In a suit against the administrator of an executor, by the citizens of another state, to enforce the payment of a judgment obtained against the decedent in such state, during his lifetime, and subsequently sued upon in the circuit court for the district of Minnesota, and judgment obtained thereon against the executor of the decedent, such circuit court has concurrent jurisdiction with the probate court of the state of Minnesota in which the wills of the decedent and the deceased executor have both been probated.

Demurrer to bill of complaint.

Chapman, Executor, etc., v. Borer, Adm'r, etc., and others.

H. J. Horn and *I. V. D. Heard*, for complainant.

Gilman & Clough, for defendants.

NELSON, *District Judge*.—This is a demurrer to a bill in equity filed by the complainant George M. Chapman, executor, etc., a citizen of the state of New York, against the defendants Felix A. Borer, administrator of the estate of John Gordon, deceased, Edson R. Smith, executor of the estate of George D. Snow, deceased, and others, citizens of the state of Minnesota.

The bill seeks to enforce the payment of a judgment obtained against John Gordon, in the state of New York, during his lifetime, subsequently sued upon in this court, and a judgment obtained against George D. Snow, his executor, now deceased, to be paid out of assets in his hands. Legatees, residuary and otherwise, are made parties defendant.

A demurrer is interposed, and it is urged this court has no jurisdiction; and proceedings, at least, against the executor and administrator should be instituted in the probate court of Le Sueur county, in the state of Minnesota, where the will of John Gordon was probated, as also the will of George D. Snow, the executor of Gordon's estate.

The concurrent jurisdiction of this court as a court of equity is undoubted. 1 Curtis, 178; 5 Mason, 95; 10 Howard, 56-70; and 7 Wall. 426. John Gordon's estate is liable for the payment of his debts (see Minn. Rev. St. 570, § 26), and the executor Snow, to the extent of the assets, was a trustee for creditors. If Borer, the present administrator, has not sufficient assets, the representatives of Snow must respond if sufficient assets of Gordon's estate have passed into their hands.

The bill of complaint alleges that Snow, in his lifetime, received a large amount of assets from Gordon's estate, and that all the legacies and debts except this judgment have been paid. I think it not doubtful that this court, the complainant being a citizen of another state, can, under the circumstances set up

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in the bill, entertain jurisdiction, and follow the property in the hands of legatees, or the representatives of Gordon under the will, to secure payment of the judgment, and in so doing make the administrator of Gordon and the executor of Snow parties to this bill of complaint. If the entire assets of a decedent's estate are in the hands of an executor or other trustees ready for distribution, and a demand is made by one or more distributees, which is refused, and the trustee will not account, I think this court, in a proper case, could enforce a distribution. The same principle is involved here. The jurisdiction of the probate court is not exclusive in such a case, as the bill in equity foreshadows. I understand the decision in *Payne v. Hook*, 7 Wall. 426, to go to this extent, without reference to the peculiar *status* of the probate court of Missouri.

Demurrer overruled, and defendants have until April rule day to answer.

WILLIAM GUM v. THE EQUITABLE TRUST COMPANY and
JONATHAN EDWARDS, Trustee.

(District of Iowa. October, 1873.)

1. UNRECORDED DEED — POSSESSION — NOTICE. — Complainant purchased certain land from B. and took a conveyance which he neglected to place on record. B. subsequently made a mortgage to respondents upon other lands, and by mistake included in said mortgage the land previously sold to complainant. The respondents claimed the land under the mortgage. Held, that they were not *bona fide* purchasers without notice, since the complainant was in the actual open, notorious, adverse possession of the land when the mortgage was executed. Actual possession is constructive notice to all the world.
2. MISTAKE OF TRACT — ESTOPPEL. — B., in order to obtain a loan of \$3,000 from respondents, proposed to secure them by deed of trust on his home farm. In his application for the loan and in the appraisement which accompanied the same, the land which complainant had previously purchased from B. was by mistake included with the farm. The complainant was one of the appraisers of the land and signed the written appraisement,

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- supposing it related to the farm only, and ignorant of the fact that his own land was included. *Held*, that he was not estopped.
3. SAME. — A mere appraiser of land, serving gratuitously for the benefit of others, without any interest of his own involved, is not to suffer by reason of an innocent mistake respecting the description of the land. Estoppel in such a case can proceed only upon the ground of fraud or gross negligence.
4. AGENCY — SALE AGENT. — It is not always necessary that a sale agent should be known to his principal, or in any way recognized by him, in order to bind the latter. Authority is sometimes implied from the very nature of the duties and powers committed to a general agent, to employ sale agents, and, when this is the case, the principal is bound by the acts of the sale agent whether the sale agent be known to him personally or not.

Equity.

J. C. Coad, Trimble & Carruthers, for plaintiff.

Brown & Dudley, for defendants.

LOVE, *District Judge*. — This bill is brought to cancel a certain trust deed executed by William and Nancy Beard to said Jonathan Edwards, trustee, to secure the payment to said Edwards' co-defendant the sum of \$3,000, so far as said trust deed embraces certain lands described in the bill and claimed as the property of this complainant.

The evidence clearly shows that about the year 1865 William Beard, who was the father of Sarah E. Gum, the wife of this complainant, sold to said William Gum the following lands and tenements in Davis county, Iowa, viz.: The W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 8, and the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 5, in township 68, range 15; and that said William Beard about the same time gave to said Sarah E. forty acres of land adjoining the above described, as follows: The N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 8, same township and range.

The sale to William Gum was for a full and valuable consideration, which was paid by said Gum.

Said William and Sarah E. Gum took possession of the land and made valuable improvements upon it. They have had the open uninterrupted and adverse occupancy of the land for about

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twelve years, from the year 1865 to the time of the bringing of the suit. They are illiterate and ignorant people.

No conveyance was made to them of the land until the 17th day of April, 1865, when William Beard and wife executed separate deeds to them for the land in question; that through the negligence of these grantees, their deeds were not filed for record till August 26, 1876.

It also appears that about the month of February, 1876, William Beard made application through the Davis County Loan Co., of which the managing members were F. C. Overton and Amos Steckel, to the defendant Trust Co., for a loan of \$3,000; that said William Beard executed a deed of trust to secure the same to said Jonathan Edwards, as trustee for the company, which said deed of trust was delivered and duly recorded on the 30th day of March, 1876; that this deed of trust included, with some of said Beard's land, the above described land, which had been previously conveyed by Beard to this complainant and his wife.

It further clearly appears from the evidence, that, so far as said Beard was concerned, the said land of the complainant and his wife was included in the deed of trust by inadvertence and mistake; that Beard did not intend to mortgage the complainant's land, or any part of it, to secure said loan, but intended and agreed to execute the mortgage upon his (Beard's) own land, being in part the land on which Beard lived.

It further appears clearly by a great preponderance of evidence, that when said Overton, after the loan had been agreed upon, was at Beard's house for the purpose of having the deed of trust executed, Gum, the complainant, was present; that both Gum and Beard cautioned Overton not to get the mortgage on Gum's land; that Overton called for Gum's deeds; that Gum went to his own house and returned with the two deeds from Beard to him and his wife; that he handed these two deeds to Overton; that Overton took them and compared the description, and assured Gum that his (Gum's) land was not included in the deed of trust; that neither Gum nor Beard

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or his wife could read or write; that the deed of trust was not read over to Beard and his wife, but that they executed and delivered the same to Overton, by whom it was taken away.

Thus it appears that the property involved in this suit did not, at the time when William Beard conveyed it by way of mortgage to respondents, belong to him.

It was then, in fact, as the evidence clearly and satisfactorily shows, the property of the complainant William Gum. Beard had sold it to Gum for a valuable consideration in 1865, and executed a formal conveyance on the 17th day of April, 1875. Beard, therefore, clearly had no title to the land when he conveyed it to respondents on the 29th of March, 1876. Upon what grounds, then, do the respondents claim title under Beard as against William Gum, the real owner at the time of the execution of the deed of trust or mortgage to Jonathan Edwards?

The respondents place their claim of title upon two grounds:

1st. That they are purchasers without notice for value under the complainant's grantor.

2d. That respondent is estopped by his own action as appraiser from now setting up his title as against the respondents.

Both parties claim title under a common grantor, William Beard. The complainant's deed was first executed, but it was not filed for record until after the recording of the respondents' deed, when the respondents advanced their money and took Beard's mortgage to secure it. Beard was of record the apparent owner of the property.

There was then no record of any conveyance from Beard to complainant. If this were all, the respondents would have a clear right to the property as against the unrecorded deed of the complainant.

This is undoubtedly true, if it be found that Overton was not the respondents' agent in taking the conveyance. Overton had actual notice of the conveyance from Beard to Gum under which the latter claims — of this there can be no question upon the evidence. The proof that Gum, when Overton was at

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Beard's house to get the mortgage executed, exhibited his deed to Overton, leaves no doubt whatever that Overton had actual notice of Gum's deed.

But respondents insist that Overton was not their agent, and they offer testimony to show that they had no agent in Iowa to effect loans for them.

It would seem, if we are to credit their witnesses, that none of the middle men were acting for the respondents, or for their interest. These middle men were not the principals in the transaction. They were agents for some one, and if the testimony of respondents' witnesses be correct, they were acting as agents for Beard.

And from this, the conclusions follow that the respondent, a monied corporation, was engaged in the business of lending money in this distant state, not upon information furnished by their own agents, but upon information supplied to them by the agents of the borrowers. In other words, the borrowers' agents made abstracts of title, examined and valued the land, and gave information of the character and responsibility of the borrowers, and upon the information so furnished the corporation based their loans! It must be admitted that this is somewhat extraordinary, if true. But if it be conceded, then it follows that the respondents had no actual notice of Gum's prior deed; but had defendants not constructive notice of the existence of that conveyance? The complainant was at the time of the execution of the mortgage in the actual open and notorious adverse possession of the land; he had occupied the land for a period of eleven or twelve years. Now, under the settled law of Iowa, this possession of the complainants was equivalent to constructive notice of the recording of the deed; actual possession is constructive notice to all the world. It matters not where the grantees resided, they were affected by this constructive notice of the complainant's title, the same as if the deed had been recorded. If complainant's deed had been recorded, it will not be claimed that respondents, wherever they resided, could have obtained a title from Beard, so as to

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have postponed the complainant. The same rule applies in case of constructive notice resulting from the actual adverse possession of the complainants.

Putting, therefore, entirely out of view the matter of actual notice to Overton or any other agent of the respondents, their claim of title as innocent purchasers for value without notice cannot be sustained.

The respondents' principal reliance, however, would seem to be upon the ground of estoppel. Let us consider the facts upon which that defense rests.

William Beard, in order to obtain a loan of \$3,000 from the respondents, proposed to secure them by a deed of trust upon his home farm, or so much of it as might be required for that purpose. It is perfectly clear from the evidence that he had no purpose whatever to mortgage the complainant's land; but in the written and printed application which it became necessary for him to make in order to comply with the rules of the defendant company, he by mistake included the land involved in this suit, which he had previously conveyed to William Gum and Sarah E. Gum, his wife. Beard's application for the loan was made through F. C. Overton and Amos Steckel, loan agents in Bloomfield; the application was made by Beard upon a printed blank, filled up by the loan agents and signed by Beard, or by some one for him. It was necessary to have the land valued by two appraisers, which was evidenced by their signatures upon another page of the same printed blank.

It appears that Beard had signed the application, and that one Luther Hunt had subscribed the appraisement, and that afterwards William Gum, at the request of Beard, went to the office of Overton and Steckel to give his appraisement of the land.

It is perfectly clear from the evidence that Gum supposed and believed that he was to appraise Beard's homestead land. Beard told him what land he was to appraise, and pointed it out to him. Gum clearly had no thought that his own land or

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any part of it was to be included in the appraisalment, but only the land of Beard, which the latter had shown him. Gum, with this understanding, went at Beard's request to Overton and Steckel's office to make the appraisalment.

Upon the face of the appraisalment it appears that Gum signed it and swore to it, but Gum swears that neither the application nor appraisalment was read to him, and that no oath was administered. He was an ignorant man, and could neither read nor write. There is very good reason to believe Gum's statement as to what happened at the loan agent's office when he went to appraise the land. But let us assume that the appraisalment was signed by Gum, as it appears to be, and that both the application and appraisalment were read over to him.

The application contained, as I have said, a description of the land by numbers, with a plat of the same. The description by numbers erroneously and by mistake included Gum's land, but the plat showed that Beard's land, and not Gum's, was the land intended to be appraised and mortgaged.

Beard in the application makes the following answers:

11. By whom are the premises occupied?

Ans. By applicant.

14. In whom is the title vested?

Ans. "Applicant."

The appraisers appear upon the face of the paper, after giving their valuation of the land, to affirm (the same being in printed form) as follows:

"We also state that the condition of the property is truly set forth in the applicant's statement in said application, and that his answers to the questions contained therein are true, as we verily believe."

This is what constitutes the estoppel asserted by the respondents. They insist that the appraisalment is an essential part of the application, and that they took the loan on the faith of it, believing what the appraisers affirmed under oath to be true, and that they would not have parted with their money

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but for their belief in the truth of the statement contained in the appraisement.

How far the lenders of money rely upon the statements of appraisers respecting the borrower's title to land, is certainly very questionable. Appraisers are generally understood to be freeholders of the neighborhood, called to place a value upon the land. They are not supposed to be acquainted with land titles. Anything they are made to answer in an indirect way to printed questions as to their belief in the truth of what the borrower affirms respecting his title, would, we should think, have very little weight with the lender in determining the matter of title. The lender must surely rest his determination as to the title upon more certain, direct and reliable information than the answers which he thus obtains from persons called upon to make a gratuitous valuation of the land. What the appraiser may affirm in regard to the title must be regarded, I think, as a mere make-weight by the lender in making upon his judgment.

But, however this may be, it is perfectly clear upon the evidence in this case, that William Gum, if the application was read to him, and if he did affirm that Beard occupied and owned the land described by numbers in that application, was laboring under a mistake of fact. Gum believed that he was speaking with reference to the land which Beard had pointed out to him, and which he came to appraise. The mistake was perfectly innocent on his part. He was a volunteer, acting at the request of, and for the accommodation of other parties; his services were gratuitous; he had no interest whatever in the transaction. Now it would certainly strike any one as a severe measure of justice if a mere appraiser of land, serving gratuitously for the benefit of others, without any interest whatever of his own involved, should lose his homestead and his farm in consequence of an innocent mistake respecting the description of the land.

If in such a case the appraiser's own land should be inadvertently described by numbers in the borrower's application,

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and the appraiser should innocently and without the least semblance of fraud, by mere mistake, untruly affirm that the borrower is in possession of the land, and has good title to it, is he to be visited with the heavy penalty of the loss of his farm and his homestead?

Certainly nothing but fraud or gross negligence on the part of the appraiser could justify so severe a judgment against him. Indeed, estoppel must proceed upon the ground of fraud or gross negligence. These elements lie at the very foundation of the doctrine of estoppel. It is at best a severe doctrine that closes the mouth of a party and denies him the right to assert the truth respecting his title. That there was any fraud on the part of Gum in this appraisalment will not be asserted. It is clear that he acted in perfect good faith.

There is no evidence to warrant the imputation of gross negligence on the part of Gum. Admitting that the application and appraisalment were read to him, and that he did not, from the reading of the numbers, see that his own land was described, it does by no means follow that he can be charged with negligence. There are many careful men who do not retain in memory the numbers describing their land, and who would not, from the mere reading of the numbers, know that their own land was described. If any one doubts, this, let him make the experiment upon himself, and I think he will be convinced. Moreover, Gum came to the loan office to appraise Beard's land, which had been pointed out to him. Beard and Overton both told him the land was Beard's. They described the land in the application, and Overton, as we assume, read it to him. Had he any reason to suppose that they had inserted wrong numbers in the paper read to him, and, least of all, that they had inserted numbers describing his (Gum's) own land? What Gum came for was to value, not describe the land or verify the description. To have scrutinized the numbers, to have verified them by comparison with deeds and records, or with the plat which accompanied the application, would indeed have been acts of extraordinary care and

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diligence. But the failure to do these acts falls very far short of gross negligence.

There is another circumstance which goes very far to relieve Gum of the imputation of gross negligence, or, indeed, of any negligence at all. There was a plat attached to the application; indeed, it was on the same sheet of paper. This plat had been made by Luther Hunt. Upon this plat the land which was to be appraised was marked out. If Gum, who could neither read nor write, is to be strictly bound by the printed and written parts of the application, by much greater reason is he entitled to the benefit of any inference justly to be drawn from the fact apparent on the face of the plat in question. Was it not perfectly natural for Gum, an illiterate man, to look to the plat as truly showing the land to be appraised, and for that reason give less attention to the numbers as read off to him? Is there one man in a thousand, who, if called upon to appraise land, and to affirm anything respecting it, would not rely rather upon the plat of the land exhibited to him by the parties interested for a true description, than upon the numbers of the land?

Now upon the plat thus exhibited to Gum, the land marked for appraisement was Beard's land, not Gum's. What the plat showed corresponded with what Gum had been informed by Beard respecting the land to be appraised.

It may doubtless be said that the respondents have been mistaken and injured by the false and negligent statements of the complainant, and that the complainant ought to be responsible for the consequences; that if one of two innocent parties must suffer, the damages should fall upon him who causes the injury, though ever so innocently, etc.

But in the first place the respondents cannot fairly trace their injury to the appraisement. They must look behind it to Overton, who was really the party whose misconduct led to the whole difficulty. I am satisfied, from the evidence, that all the parties except Overton labored under an honest mistake as to the land conveyed.

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It would seem that even Overton labored under the same mistake until the deeds of the complainant and his wife were exhibited to him at Beard's house.

Now Overton was certainly not the complainant's agent. Whether he acted as agent for Beard or for the respondents may admit of question.

If I found it necessary to decide this question, I would be compelled to say that, in my opinion, the preponderance of evidence tends to establish the fact that Overton was, as to that transaction, acting for the respondents.

It is not necessary that a sub-agent should be known to his principal, or in any way recognized by his principal, in order to bind the latter. The innumerable sub-agents of railroads and other corporations are entirely unknown to their principals. Authority is sometimes implied from the very nature of the duties and powers committed to a general agent to employ sub-agents, and when this is the case, the principal is bound by the acts of the sub-agent, although the latter may never be known or recognized by the principal.

It would be difficult to affirm that, from the very nature of the business committed to Underwood and Clark, they did not have implied power to employ sub-agents in effecting loans for respondents.

It is not, however, necessary, in my view of this case, to determine whether or not the middle men in this case were, in fact, the agents of the respondents.

Lastly, if the respondents have received injury, they have a plain and adequate remedy. Beard is not insolvent, and he has not, it seems, conveyed the land which he intended to mortgage to respondents. The respondents can undoubtedly file their bill to correct the mistake, and subject the land intended to be conveyed to the payment of their mortgage debt.

Thus exact justice may be meted out to all parties.

Decree for the complainant.

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BECHER and others v. THE WELLS FLOURING MILL Co. and others.

(District of Minnesota. March, 1880.)

1. CORPORATION — ASSIGNEES OF STOCK CERTIFICATES — SHAREHOLDERS TRANSFER UPON THE BOOKS OF THE CORPORATION.— The assignees of stock certificates in a corporation, by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignment, shareholders, when the transfer of shares is required to be made upon the books of the company.
2. SAME—SAME—EVIDENCE AS TO CHARACTER OF ASSIGNMENT.—Evidence is admissible in behalf of the corporation to show the true character of such assignment, in order to determine the relation of the assignees.
3. SAME—SAME—ULTRA VIRES—INJUNCTION.—An injunction will be refused, upon the prayer of such assignees, for the purpose of restraining such corporation from holding a meeting in order to increase the corporate debt, or from increasing such debt until the stock in controversy has been transferred to the assignees upon the books of the company, or from voting upon the stock thus assigned, where it appears that the stock was merely pledged by the assignment of the certificates, and it was manifest that the proposed increase of the corporate debt was not *ultra vires*.

Application for injunction, *pendente lite*. Motion to dismiss the plaintiffs' bill upon the hearing

Davis, O'Brien & Wilson, for plaintiffs.

M. W. Green, for defendants.

NELSON, *District Judge*.—A suit in equity is brought by the complainants, claiming to be stockholders in the defendant corporation by virtue of certain certificates of stock assigned to them by the persons to whom they were originally issued, and who appear as owners on the books of the corporation. The certificates are not only assigned to the complainants, but written direction is given to the secretary of the corporation to make the necessary transfer upon the books. These certificates represent one hundred and nine shares of the stock—forty shares assigned to E. J. Becher, and the remainder to L.

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A. Becher. The relief prayed for is that the corporation and other defendants, officers and stockholders, may be enjoined from calling or holding any meeting of the company for the purpose of increasing the debt of said corporation; from increasing such debt until after this stock has been transferred to the complainants upon the books of said company; and that the said defendants, and each of them, may be restrained and prohibited from voting upon any stock so, as aforesaid, assigned to complainants; and from further increasing the debt of said company by any proceeding, or in any manner whatever, until the further order of the court. A perpetual injunction is also prayed for, as well as general relief.

The defendant corporation was organized under the laws of the state of Minnesota (Minn. Rev. St. 396), and has been in operation since May 30, 1879, incurring an indebtedness, up to this time, for improvements and milling machinery, to the maximum allowed by the articles of association.

It is proposed to call a meeting for the purpose of increasing the stock of the corporation, in accordance with the law, to meet the demands of business, and no notice has been given the complainants.

It is pretty well settled that the assignees of stock certificates in a corporation, by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignment, shareholders, when the transfer of shares is required to be made upon the books of the company. See Field on Corporations, 75; Angell & Ames on Corporations; Minn. Rev. St. 398, § 135.

The mere assignment gives the assignee an equitable title only, except as against the assignor. The certificates do not constitute property in the corporation; they are the muni-ments of title, but it is the shares of stock which constitute the property, and the persons whose names appear upon the books of the corporation are presumed to be the stockholders; they have the right to vote and participate in directing the

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policy of the company. The corporation has not recognized the complainants as stockholders, and thus waived any right to require such registry, and the affidavits read on the hearing do not make it clear that a demand for the transfer of the stock was ever made. If it was, and there was a refusal to comply, legal proceedings would undoubtedly secure to the complainants the proper relief. It is clear that if this court has jurisdiction of the case to grant other equitable relief prayed it could also entertain a claim for damages on account of a refusal to make the proper transfer. This disposes of the preliminary motion to dismiss the bill.

It appears from the affidavits read that complainants, being the owners of a flouring mill in the village of Wells, Minnesota, sold it to the defendants Eaton, Thombs, Barnes, Southwick and Stevens, who organized, under the laws of the state of Minnesota, the corporation called "The Wells Flouring Mill Co." They paid a part of the purchase price and gave notes for the balance, pledging, as collateral security for payment, shares of stock, viz.: Twenty-five shares owned by Eaton, twenty shares owned by Southwick, fifteen shares owned by Stevens, and nine shares owned by Barnes, were assigned and pledged to L. A. Becher; and forty shares, owned by Thombs, were assigned and pledged to E. G. Becher. The Southwick shares, by the terms of the pledge, became absolutely the property of L. A. Becher on failure to pay his obligations.

It is objected that these affidavits should not be received to vary or change the absolute assignment of the shares expressed in writing on the certificates. Whatever the rule may be, as between the assignors and assignees, I think the corporation can show the true character of the contract of assignment, and thus determine the relation of these assignees of stock certificates. If the shares of stock are merely pledged by the assignment of the certificates, the holders would not be entitled to the rights, nor subject to the liabili-

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ties, of the owners of shares; they could only become owners by a sale and purchase of the stock pledged, on failure of the pledgors to pay the debt.

The pledgees holding the certificates, and the corporation having notice thereof, it will be liable for any transfer upon the books of the company, of the pledged stock, without their consent. The bill charges that the defendants propose to increase the indebtedness of the company wrongfully and unnecessarily, but the opposing affidavits controvert this allegation.

It is clear that the stockholders have a right to increase the stock, or indebtedness, of the corporation, if such policy is regarded necessary for the interests of the company. See Minn. Rev. St. 396, § 121; Laws Minn. 1875, p. 53.

A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is *ultra vires*. I am not satisfied, from the affidavits read at the hearing, that an increase of stock will cripple the corporation and make it insolvent, or that an increase of indebtedness may not be proper. There is no fraud or conspiracy on the part of the defendants, who are stockholders, to injure the complainants. I have not considered the question whether the complainants are entitled to any equitable relief, but, for the purposes of this motion, concede it.

An injunction is refused, and the restraining order is dissolved.

THE STATE OF MISSOURI, etc., v. MERRITT and others.

(*Eastern District of Missouri. March, 1880.*)

REMOVAL OF CAUSE—ACT MARCH 3, 1875—TERM PRIOR AND TRIAL SUBSEQUENT TO PASSAGE OF ACT.—The right to remove a cause from a state court, under the act of March 3, 1875, is lost where such cause was tried in a term which began before, but at a date which was subsequent to, the passage of that act.

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Motion to remand the cause to the state court.

Cane, Jameson & Day, for plaintiff.

George P. Strong, for defendants.

McCRARY, *Circuit Judge*. — This cause is brought here by removal from the circuit court of the city of St. Louis, and the motion now before us is to remand it to that court, for the reason that the petition for removal was not filed within the time prescribed by the act of congress of March 3, 1875.

The third section of that act requires that the petition for removal shall be filed "in such state court before or at the term at which said cause could be first tried, and before trial thereof." In this case the facts are that the act of congress took effect March 3, 1875, at which time this cause was pending in the state court, which was then in session. The term of the state court began in February, 1875, several weeks before the passage of the act, and continued some months after its passage. On the 10th of March, 1875, — seven days after the passage of the act, — the case was tried, and there was verdict and judgment for the plaintiff. The cause was taken by writ of error to the court of appeals, and thence to the supreme court of Missouri, and, having been reversed, was in January last remanded to the circuit court of the city of St. Louis for re-trial. Thereupon, on January 31st last, it was, upon petition of defendant, removed to this court. Was the February term, 1875, of the said state court, "the term at which said cause could be first tried," within the meaning of the act of congress? The position of the counsel for the defendant is that the term of court intended by the statute is a term *beginning* after the passage of the act, and to sustain this view he has cited numerous authorities, which are referred to in the note to this opinion. I have examined these cases and do not find that they have the effect claimed for them by counsel.

Some of them hold that where a case was tried before the passage of the act, and a new trial was granted subsequent to

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its passage, a petition for removal was in time if filed at any time before the first term at which such second trial could be had; and others hold that where the case was pending when the act took effect, and for one or more terms before, and the petition for removal was filed at or before the first term thereafter at which the case could be tried, it was in time. In substance, the rule established by the adjudications is that the act applies to cases pending at the time of its passage, and there shall be an opportunity to apply it to all such cases. But no case has been cited which holds the right of removal was not lost by voluntarily going to trial in the state court after the passage of the act, and I am certainly not disposed to go to this length unless constrained by a ruling of the supreme court. The statute not only requires the petition for removal to be filed "at the term at which said cause could be first tried," but also that it be filed "before the trial thereof." If it be regarded as settled that this language refers to a trial after the passage of the act (and no case has gone further than this), it does not follow that it refers to a trial at a term of court *commencing* after the act was passed. By its terms, and by its evident spirit and intent, it applies to a trial after the passage of the act, but during a term of court commencing before.

The motion to remand is sustained.

NOTE. — *Meyer v. Delaware R. Construction Co.* U. S. Sup. Court, October term, 1879; *Am. Bible Society v. Grove et al.* U. S. Sup. Court, October term, 1879; *McCullough v. Sterling Co.* 4 Dillon, 562; *Hoadley v. San Francisco*, 3 Law, 553; *Crane v. Reeder*, 15 Albany L. J. 103; *Andrews' Ex'rs v. Garrett*, 2 Cent. L. J. 797; *Rain v. R. Co.* 3 Cent. L. J. 12.

P. P. MARRION BLACKSMITH & WRECKING CO. v. THE STEAM-
BOAT "H. C. YAEGER."

(*Eastern District of Missouri. March, 1880.*)

1. ADMIRALTY — JURISDICTION — HOME PORT — SERVICES TO STRANDED BOAT. — Services rendered a steamboat stranded upon a bar in the Missis-

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- issippi river, some 65 or 70 miles below St. Louis, on a voyage from that port to New Orleans, are not to be regarded as having been rendered in her home port, although such boat may have been at the time within the territory of the state of Missouri.
2. **SERVICES RENDERED AT REQUEST OF MASTER—PRESUMPTIONS.**—Where such services were rendered at the request of the master, it will be presumed that they were necessary, and properly rendered on the credit of the vessel.
 3. **CLAIM FOR SERVICES—ASSIGNMENT.**—The owners of one-half of the claim for such services, who have obtained the other half by assignment, are entitled to sue for the whole.
 4. **LIEN—SALVAGE.**—Although the services rendered were not in the nature of salvage, the right of the libellants to a lien was not thereby affected.

In admiralty. Appeal from the district court.

B. H. Kern, for libellants.

W. F. Smith, for appellant.

McCrary, Circuit Judge.—The steamboat "H. C. Yaeger" left the port of St. Louis about the 24th of November, 1878, bound upon a voyage down the Mississippi river to New Orleans. On the way she grounded at a place called Kaskaskia Bend, about sixty-five to seventy miles below St. Louis. After making unsuccessful efforts to free his vessel from the bar on which she was fast, the master engaged the services of the tug-boat "Wild Boy," then in the neighborhood, and owned by the libellants, though chartered to Burgess & Co., on terms to be hereafter stated. The tug, with a small crew, went to the relief of the "Yaeger," taking a barge alongside, into which a portion of the cargo was placed, and after some hours' labor the vessel was pried from the bar on which she was grounded and enabled to proceed upon her voyage. The officers of the two vessels could not agree as to the price to be paid for these services, and hence this suit. There was judgment below for \$350, and the claimants appeal. Upon due consideration I have reached the following conclusions:

1. That under the circumstances the steamboat "Yaeger" is not to be regarded as having been in her home port at the time

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the services were rendered. She was not in port, but launched and afloat, proceeding on her voyage, and, therefore, clearly within the admiralty jurisdiction, whether within or without the territorial limits of the state of Missouri.

2. The fact that the services were rendered at the request of the master, and for the purpose of relieving the vessel from her stranded condition, raises a strong presumption that they were properly rendered on the credit of the vessel, and were necessary; and the claimants, in order to overcome this presumption, must show affirmatively that the credit was given exclusively to the owners. This they have not done.

3. At the time the service was rendered the tow-boat "Wild Boy" was in the possession of Burgess & Co., who had chartered it. These charterers were to pay the owners \$20 per day, and one-half of what was earned by the boat in such service as that now in controversy. The libellants, therefore, who are the owners of the "Wild Boy," were the owners of one-half the claim originally, and, having obtained the other half by assignment, my opinion is that they are entitled to sue for the whole.

4. Whether the service was in the nature of salvage or not, makes no difference as to the right of libellants to a lien. If, however, this were a case of salvage, they might recover extra compensation. In my opinion the circumstances were not so extraordinary, nor the peril sufficiently great, to justify an extra allowance, on the theory that the services were in the nature of salvage. I am strengthened in this view by the fact, which appears in evidence, that the bill, as at first presented by the master of the "Wild Boy," was for \$175 only. The evidence is very conflicting as to what would have been a reasonable compensation, as it is also upon the question whether there was a contract to render the service at \$7 per hour; but, inasmuch as the sum of \$175 was originally fixed by the master of the tug, who was the person who made the contract and rendered the service, and, inasmuch as that is about the sum that is established by the weight of the evi-

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dence, I have adopted it as the amount of the libellants' recovery.

The decree below is modified accordingly, and the vessel is charged with a lien for \$175, with interest and costs.

IN THE MATTER OF WALRUP, Bankrupt.

(*Eastern District of Missouri.* March, 1830.)

SALE—FALSE PRETENSES—RATIFICATION. —The refusal of a vendor to take back goods obtained by false pretenses, in order to obtain a preference over other creditors, amounts to a ratification of the sale.

In bankruptcy. Appeal from district court.

Jacob Klein, for assignee.

Patrick & Frank, for petitioners.

MCCRARY, *Circuit Judge*. —This is a petition filed by J. Weil & Bro. praying an order against the assignee of John Walrup, bankrupt, directing him to return to petitioners certain dry goods sold and delivered by them to the bankrupt prior to the commencement of the bankruptcy proceedings. This order is asked upon the ground that the goods in question were obtained by the bankrupt from the petitioners by means of false representations as to his financial condition. There is some doubt upon the question whether the proof shows that the bankrupt obtained the goods, not intending to pay for them, and this, according to the ruling of the supreme court in *Donaldson, Assignee, v. Farwell*, 93 U. S. 631, must appear. It is not, however, necessary to go into the proof upon that question, for the case may well be determined upon another point. It is very clear that the vendor, who has been induced by fraudulent and false representations to part with the goods, must, upon discovering the fraud, promptly disaffirm the contract in order to be entitled to a return of the

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property. In this case it appears, from the report of the register, that the petitioners not only did not comply with this requirement of the law, but that they failed to take back the goods when the bankrupt offered to return them. The register, in his report, says:

“The facts appear to be that on receiving notice from the debtor of the proposed meeting of creditors for the purpose of securing an extension, as heretofore stated, one of the members of petitioners’ firm called in person upon the debtor, *who then made a proposal to return the goods*, they then being, as now, in unbroken packages; and after some parley between the parties no final action was taken.”

The character of this parley we may gather from the further facts stated by the register, that “there is some evidence tending to show that at the time of this interview the petitioners endeavored to secure from the debtor some arrangement by which their claim would be protected,” etc. I have no doubt that an attempt to secure the debt, or to obtain a preference, after knowledge of the fraud, would amount to an affirmance of the sale, even if not accompanied by a refusal to take back the goods. It is apparent that when this offer to return the goods was made, the petitioners knew that the bankrupt had misrepresented his financial condition in order to obtain them. The fact of his offering to return the goods, in connection with his calling a meeting of his creditors and acknowledging his insolvency, was enough to advise the petitioners that the representations he had made to them were false. It was their duty, therefore, to accept the offer when made, and they failed to do so at their peril. If they failed to accept them for any reason except ignorance of the facts it was an affirmance of the sale, and, *a fortiori*, it was an affirmance if they refused in order to continue negotiations for securing a preference.

The judgment of the district court, denying the prayer of the petition, is affirmed.

Green v. Betts and another.

GREEN v. BETTS and another.

(*Eastern District of Missouri.* March, 1880.

VENDOR'S LIEN — ASSIGNMENT — FAILURE OF CONSIDERATION — SPECIFIC PERFORMANCE. — A partial failure of consideration does not render the assignment of a vendor's lien void, and the assignor cannot subsequently seek to enforce the lien by a suit for specific performance before such assignment has been duly avoided.

Suit to enforce vendor's lien upon specific real estate.

Wagner, Dyer & Emmons, for complainant.

W. B. Homer, for defendant.

MCCREARY, Circuit Judge. — This is a bill in chancery, brought to enforce a vendor's lien upon certain real estate described in the petition. The following are the material facts: On the twelfth day of September, 1873, the plaintiff and defendant Betts entered into a written agreement for an exchange of real estate, by the terms of which, plaintiff agreed to convey to said defendant his farm in Carroll county, Missouri, on which he then resided; and the defendant Betts, on his part, agreed to convey to plaintiff several designated tracts of real estate, including one which is averred to be, with no other description — "160 acres of Missouri land, with perfect title."

It is averred in the bill that defendant Brewster was a party to the transaction, although not signing the contract, and that the farm in Carroll county, Missouri, above named, was, by consent, conveyed to him instead of Betts, and that he had notice of plaintiff's claim. It is conceded that the contract has been complied with in all respects, except as to the conveyance of the 160 acres of Missouri land. Concerning this latter, which is the subject of this controversy, the facts, so far as they need now be determined, are as follows: The plaintiff, by an instrument in writing which is not dated, but which was executed prior to January 7, 1874, assigned his

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claim for the said 160 acres of Missouri land to one J. S. Winfrey. This assignment was in the form of an order, addressed to defendant Betts, directing him to make the deed for said land to Winfrey, and signed by the plaintiff. On the seventh of January, 1874, it was assigned by Winfrey to John Dickinson, and on the fourteenth of March, 1874, it was presented to and duly accepted by defendant Betts. Thus the matter stood when, on the thirty-first of December, 1878, this suit was brought. On the first of August, 1879, seven months after the filing of the bill in this case, the order was assigned by Dickinson to the plaintiff.

It is insisted for the defense that these facts show that plaintiff did not own the cause of action at the time he brought the suit, and that therefore he cannot recover, in view of the well settled rule that the plaintiff in a suit must recover, if at all, upon the facts as they existed when he commenced proceedings. *Reppy v. Reppy*, 46 Mo. 571; *McDowell v. Morgan*, 33 Mo. 555; *Waterman on Setoff*, 414. But it is insisted by the counsel for plaintiff that the case does not fall within this rule, because the assignment from Green to Winfrey was fraudulent and void. The proof upon this subject is that the consignment was executed in consideration of the purchase by plaintiff from Winfrey of the right to use and sell a certain patented article within a specified territory. The plaintiff testifies that a portion of the territory had been previously sold, and that he was therefore defrauded; but he does not claim that all the territory had been previously sold, nor that the consideration for the assignment wholly failed. On the contrary, he admits that he made sales under the patent, and received some money therefor, though the amount is not specified.

It is evident, from the plaintiff's own statements upon this subject, that the contract of assignment was voidable only, and not absolutely null and void. It was not a transaction which he could of his own notion disregard *in toto*. He could not proceed to sue upon the contract as if it had never been as-

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signed. It was probably a case in which the plaintiff had the right to rescind the contract by taking the necessary steps. But to do this he was bound to return, or offer to return, whatever of value he had received under the contract. He was bound to do whatever was in his power to place the parties in *statu quo*. Bishop on Contracts, § 203, and cases cited in note.

But it is further insisted that the proof shows that after the execution of the assignment, and while it was outstanding, the plaintiff demanded a deed from Betts, and notified him that the assignment to Winfrey was fraudulent, and that Betts then agreed verbally to convey to plaintiff, and did not insist upon the objection that the assignment and his acceptance thereof were outstanding. Here there is a serious conflict of testimony, but my conclusion is that the new promise is not established. Nor could it be upheld if proved, as it seems to have been without consideration. Besides, all the probabilities are against the correctness of plaintiff's version of this transaction.

It is not at all probable that Betts, with a knowledge that the assignment, with his written acceptance thereon, was outstanding, voluntarily agreed to make the deed in disregard thereof, and at his own risk. These considerations lead inevitably to the conclusion that the plaintiff did not own the cause of action when the suit was brought.

Counsel have discussed several other questions, to wit: (1) Whether there is sufficient proof of notice to Brewster; (2) whether the vendor's lien was lost by his assignment of the claim for balance of the purchase price; (3) whether the plaintiff, if entitled to a lien, should recover the sum claimed (\$1,180), and interest, or only the actual value of the 160 acres of Missouri land.

The ruling upon the question first discussed renders it unnecessary to pass upon any of these questions. I may remark, however, that there is a serious conflict of authority upon the question, whether a vendor's lien can be assigned. (See *Macketti*

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v. *Symmons*, White & Tudor's Lead. Cases in Eq. 235.) Although the plaintiff cannot recover in this proceeding, because he had no cause of action when the suit was commenced; yet, as he has since come again lawfully into possession of the claim, and now owns it, I think it right to dismiss the suit, without prejudice, at plaintiff's cost, and it is so ordered.

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(*Eastern District of Missouri*. March, 1880.)

1. PLEADING—CERTAIN RULES RESTATED.—(1) In pleading, the parties respectively must aver the issuable facts and nothing more; (2) if a pleading has not sufficient issuable facts to constitute a cause of action or defense, or is mixed with statements as to evidence to support the same, the opposite party may demur; (3) if a pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable and others non-issuable, the opposite party may move to make the pleading more definite and certain; (4) but motions to strike out special clauses and sentences in a pleading will not be entertained.
2. CONTRACT—PREFERENCE.—A contract to give one of several creditors a preference over others for consenting to a composition is void.

Motion to strike out a special defense.

Dryden & Dryden, for plaintiffs.

Vernon W. Knapp and *McComas & McKeighan*, for defendants.

McCREARY, *Circuit Judge*.—This is a motion to strike out a special defense. This cause was before the court at a previous term, Judge DILLON presiding, at which time it was suggested that the questions designed to be raised could be presented in a better form under a special answer. Since then an amended petition and an answer thereto have been filed.

It is of importance, not for this cause alone, but for the general practice of the court, that the modes of proceeding

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should be clearly understood, and I therefore take this occasion to restate some well settled rules which prevail in this court.

Mr. Justice MILLER, at an early day, with the concurrence of Judges DILLON and TREAT, held:

First. That in pleading, the parties respectively must aver the issuable facts and nothing more.

If irrelevant and redundant matter is inserted in the petition or answer the court will not entertain a motion to eliminate the same, but will receive a motion to make said pleading more certain and definite. The reason for this ruling is based not only on the essential requisites of good pleading, but on the duty of attorneys to so plead as not to drive the opposing attorney, with the aid of the court, to do the pleading for the party. The function of the court is to pass upon the papers filed, and not to become the pleader for the parties. Let the plaintiff and defendant respectively come to an issue, not on matters of evidence, relevant or irrelevant, but on the ultimate facts, determining their respective rights. There is nothing in the Missouri practice act which abrogates these essential rules of pleading. The very object of pleading is to bring the parties face to face with the issuable facts on which their rights depend.

Second. If a pleading has not issuable facts sufficient to constitute a cause of action or a defense, or is mixed with statements as to evidence to support the same, the opposite party may demur; so that the court, disregarding the irrelevant matter, may determine whether the alleged cause of action or special defense has any foundation in law.

Third. If the vicious pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable and others non-issuable, the proper practice is a motion to make the pleading more definite and certain.

Fourth. Motions to strike out special clauses or sentences in a pleading this court will not entertain, for it cannot deter-

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mine, in advance of the trial, to what issuable facts they may pertain; nor will the court, through such motions, be driven to the necessity, after repeated experiments, of doing practically the pleading for the party in default. This court recognizes, therefore, demurrers and motions to make pleadings more definite and specific. A motion to strike out, if admissible at all, must be directed to an entire pleading, or a whole count or division. Matter appearing to be scandalous would form an exception to the rule.

There is a very important consideration in this ruling, which every good pleader will recognize, viz.: that while a demurrer cuts back to the first bad pleading, it is by no means sure that a motion to strike out will effect the same end; nor is it sure that the decision on such a motion could be considered a final judgment, entitling the party to a writ of error or appeal.

These general propositions are now reduced to form, not because this case requires the statement of them, but that it may be understood that the rulings of Mr. Justice MILLER, and Judges DILLON and TREAT, heretofore made on the points stated, are to be adhered to.

As to the motion now before the court, it must suffice to say that the question intended to be presented would have been more properly raised on demurrer to the answer, instead of a motion to strike out. But, waiving that technical question, we find that the answer as to the special defense is somewhat vague; yet, if true, it makes it appear that the alleged agreement set up in the petition, if made, was fraudulent and void. The defendants ought to have put themselves distinctly on record, by positive averments; yet they have, by liberal construction, done so, and if a demurrer, instead of a motion, had been interposed, the objection made would have cut back to the petition.

The cause of action, as set out, discloses imperfectly a contract on the part of plaintiffs to receive a sum of money beyond what other creditors were to receive for assenting to a

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quasi composition; and such a contract, if the assent of all was required, the law pronounces void.

We regard the answer, liberally construed, as charging in substance that the contract sued on, if made, was one under which the plaintiffs were to receive a secret preference over other creditors of the same debtor, and this, if true, is a perfect defense.

The motion to strike out is overruled. If plaintiff desires a more specific statement of the points of defense, he may move therefor, or he may demur to the answer and thus secure a more concise and clear statement. But the present motion, for reasons stated, cannot prevail.

GAUSE V. CITY OF CLARKSVILLE.

(*Eastern District of Missouri. March, 1880.*)

1. MUNICIPAL CORPORATION — VOID BONDS — APPLICATION OF MONEY. — Where a city without power to make negotiable obligations sells its void bonds, and, receiving the money therefor, applies it to its legitimate corporate uses, an action will lie to recover the money so received and applied.
2. SAME — ASSIGNMENT OF BONDS — ACTION BY ASSIGNEE. — The right to recover money so received is transferred by the transfer of the bonds, and can be enforced by the last holder of such bonds as the assignee thereof. *Wood v. Louisiana* (MS.), U. S. Circuit Court, Eastern District Missouri, September term, 1878, affirmed.
3. SAME — VOID BONDS — ACTION BY HOLDER. — Where a bond is made by a city for two considerations, as to one of which it has power to make a bond, but as to the other has none, such bond is wholly void. The holder cannot recover on the bond as such. His remedy is an action for money had and received.
4. VALID BOND SURRENDERED FOR VOID BOND — ACTION ON SURRENDERED BOND. — Where the holder of a valid bond presents it when due to the maker, and receives in payment a renewal bond, which for any reason is void, then the old bond, though surrendered for cancellation, is not extin-

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guished, but recovery may be had on it the same as if the new bond had not been given.

5. CITY ORDINANCE—ISSUE OF BONDS—RECITAL—ESTOPPEL.—A city ordinance, authorizing a subscription to stock of a road company and issue of bonds to pay same, recited that the authority prescribed by the law as a prerequisite of such subscription had been given by an election held for the purpose. In a suit upon such bonds, *held*, that the city was estopped by such recital to show that the voters at such election were not duly sworn, and the election therefore void. Principle of estoppel by recitals in bonds applies to recitals in an ordinance authorizing the issue of bonds.
6. PLEA IN ABATEMENT—JURISDICTION—CAPACITY TO SUE.—All matters which go to challenge the jurisdiction of the court, or the capacity of the plaintiff to sue, should be presented by plea in abatement, in advance of hearing on the merits.

Action upon twenty-seven negotiable bonds of defendant, payable to bearer, of divers dates and amounts, and acquired by plaintiff after due. The amended petition contained twenty-seven special counts based on said several bonds, respectively, together with two common counts for money had and received, etc. The bonds described in counts 1 to 11, inclusive, were therein alleged, and by the evidence were shown, to have been given for money borrowed by defendant from the original payees, for the purpose either of building or improving its wharves or streets, or of paying for a city cemetery, and to have been actually used for those purposes.

Upon demurrer to like counts in the original petition, all these bonds were held to be void, for want of an express grant of power in the charter of defendant to make bonds or borrow money.

The bonds described in counts 12 to 17, inclusive, were therein alleged to have been made either in direct payment of subscriptions made by defendant to stock of certain road companies, organized under the laws of Missouri to build gravel roads leading from the defendant city to other places in Missouri, by virtue of an act approved in 1857 (Sess. Acts Mo. 1857, p. 302), or in renewal of other bonds originally so given in payment of such subscriptions. The evidence showed that the allegations as to all of these bonds were true, with the ex-

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ception of those described in counts 12 and 13. As to these it appeared that while eight-tenths of their consideration was the payment or renewal of bonds so given in payment of road subscriptions, the remaining two-tenths was money borrowed from the holders of said bonds, and applied to the general uses of defendant.

As to the bond described in the fourteenth count, it also appeared that, when due, it was surrendered to defendant by its then holder in exchange for a new bond of like amount, and bearing a like rate of interest, but which was made on April 20, 1872, and had not been registered according to the law of Missouri, passed March 30, 1872, which required all bonds issued after its passage to be registered. Sess. Acts 1872, p. 56, § 4. It also appeared that after the old bond had been surrendered it came again into possession of its holder at maturity, who transferred it to the plaintiff, who, at the trial, produced it, together with the void renewal bond, and offered to surrender the latter to defendant. The bonds described in counts 18 to 27, inclusive, were alleged and shown to have been made in payment of a subscription by defendant to the stock of a company organized to build a gravel road from the ferry landing in Illinois, opposite to Clarksville, to other points in Illinois, under a law of Missouri authorizing such subscription upon condition that the assent of the citizens was first obtained by an election. Sess. Acts 1866, p. 254. It was also alleged that such assent was in fact obtained at an election held on October 2, 1866.

Defendant pleaded as a special defense that this election was not valid because the voters were not registered, but at the trial, conceded that no registration law was in force at the time of the election, and then claimed and attempted to prove that the election was invalid because the voters were not sworn as required by section 5 of article 2 of the constitution of Missouri of 1865.

The evidence showed that the road company negotiated the bonds for value, before maturing, to sundry persons, by whom

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they were transferred to plaintiff; also, that the subscription was authorized by an ordinance passed by defendant's city council in January, 1867, in the preamble of which was the following recital, to wit:

"Whereas, the legislature of Missouri, by an act approved March 12, 1866, so amended the charter of the city of Clarksville as to authorize the city council to take stock in roads leading to the city or to the ferry landing opposite to the city, in Illinois, by first obtaining the assent of two-thirds of the legal voters of the city thereto, and, *whereas, at an especial election held for that purpose at the city hall on the second day of October, 1866, the authority was so given* * * * to subscribe the sum of \$15,000: * * * Now, therefore, be it ordained," etc.

It also appeared that the bonds were issued in payment of the subscription only as the work on the road was finished, and that defendant received and voted the stock so subscribed, and still retained the same. Two of these bonds bore date April 1, 1872, two days after the passage of the act requiring registration of bonds (Sess. Acts 1872, p. 56), and appeared never to have been registered as required by that act. At the trial, and after the cause had been heard upon its merits, defendant, without having in any way pleaded any want of jurisdiction in the court or of competency of plaintiff to sue, offered to show that all the bonds sued on were owned by residents of Missouri, and had been transferred by them to plaintiff, a resident of Texas, without value, and merely to have him sue thereon in the United States court, and to avoid suing thereon in the state courts. Plaintiff objected to such evidence as irrelevant, and the same was heard subject to such objection, the court reserving its decision as to its relevancy till the final determination of the case.

Dryden & Dryden, of counsel for plaintiff, cited the following authorities: 1 Peters, 450; id. 498; 6 How. 4; id. 23 and 30; 7 How. 198; 14 How. 505; 18 How. 76; 20 How. 264; 3 Sawyer, 599; 57 Mo. 86; 14 Mo. 428; 28 Mo. 597; 35

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Mo. 461; 40 Mo. 67; Pomeroy on Rem. §§ 128-130; *Gauss v. Clarksville*, 8 Cent. L. J. 364; Dillon on Mun. Corp. § 730; 22 Mo. 266; 4 Dill. 208; 21 N. Y. 490; *Mayor v. Ray*, 19 Wall. 484; *Wood v. Louisiana* (MS.), U. S. Circuit Court, E. D. Mo.; 1 Daniel Neg. Inst. (§§ 201, 204; 2 Kent's Com. (side) 467; Story on Bills, § 184; 14 Pick. 198; 16 Ohio St. (N. S.) 133; 15 N. Y. 96; 1 Wall. 221, 222; 10 Peters, 343; 2 W. & S. 235; 25 Ind. 31; 25 Ark. 350; 2 Daniel Neg. Inst. § 1274; 43 Vt. 319; 73 Pa. St. 400; 8 Cowen, 77; 2 Pars. N. & B. 205; 2 Bailey, 574; 19 Mo. 637; 33 Mo. 583; 24 How. 287; 99 U. S. 86; 92 U. S. 484; id. 494.

Wagner, Dyer & Emmons, of counsel for defendant, cited the following authorities: 1 Kent's Com. 349; 2 Wagner's St. p. 991, § 2, and p. 1015, § 12; Myers' Supp. to Wag. St. p. 304, § 12; *Aud v. Burrows*, 1 Otto, 426; *Ex parte McNiel*, 13 Wall. 243; Pom. Rem. pp. 155, 677, 707; *Thompson v. Railroad*, 6 Wall. 134; 1 Wagner's St. title "Interest," § 1; *Southgate v. A. & P. R.* 61 Mo. 89; Story Prom. Notes, §§ 190, 191; *Andrews v. Pond*, 13 Pet. 65; *Fowler v. Brantley*, 14 Pet. 321; *Parsons v. Jackson*, 9 Otto, 441; *Mercer County v. Hackett*, 1 Wall. 83; *Van Hastro v. Madison County*, id. 291; *Hackett v. Ottawa*, 9 Otto, 86; *Town of Weyauwega v. Ayling*, id. 112; *Supervisors v. Galbraith*, id. 214; *Brooklyn v. Ins. Co.* id. 362; *Orteans v. Platt*, id. 677.

TREAT, *District Judge*. — Most of the legal propositions involved in this case were heretofore decided on the demurrers to some of the counts. 8 Am. Law. Reg. 497.

In the case of *Wood v. The City of Louisiana*, recognized as correct by Judge DILLON in his opinion on said demurrers, it was held that although a municipality issued bonds which it had no authority to issue, and no recovery could be had on the bonds as such, yet if the money derived therefrom was received for an authorized purpose and applied to that purpose, an action would lie as for money had and received, and

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that the *bona fide* holder of said bonds could recover as assignee of the original demand.

This doctrine receives some support from the views expressed in the case of *Little Rock v. National Bank*, 98 U. S. Rep. 308, and *Shirk v. Pulaski County*, 4 Dill. 209.

Accepting the doctrines thus stated, it was for the plaintiff to prove what amount the city actually received for wharf and for street improvement bonds, respectively. The evidence shows that these bonds sold at *par*, and that the proceeds thereof were paid into the city treasury, and expended for the specific purposes designated. There were ordinances of the city authorizing said improvements, and making the needed appropriations therefor, all of which were lawful, and the money raised therefor by the sale of said bonds faithfully applied. Hence, under the rulings heretofore made in this case, the plaintiff is entitled to recover the amounts so actually loaned, with unpaid interest due from date of demand, at the rate of six per cent.

The city bought a cemetery lot, to pay for which it borrowed \$1,500, and issued a bond for \$1,650. As there was no power to issue a bond therefor, the recovery can be only for \$1,500, with unpaid interest, at the rate of six per cent.

The foregoing items cover all the counts, from the first to the eleventh, inclusive, on which, as held, there can be no recovery; but that the plaintiff would be remitted to his count for money had and received.

The demands embraced in counts from 12 to 17, inclusive, are on bonds issued in payment for subscription to gravel roads, held by Judge DILLON to be a lawful exercise of municipal authority, from which view I dissented. As his ruling must prevail, the only question open under this head is as to two of said bonds, which the evidence shows were issued on renewal, not for part payment of said subscription alone, but for an additional sum also, then borrowed for general uses of the city. It has been contended that said bonds, though invalid, *pro tanto*, as to the amount in excess of what pertained

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to said subscription, should be held valid as to the amount included therein for which the city had authority to issue negotiable securities. If this were so, a suit on a specialty would necessarily require an examination into the various items of the consideration therefor, and thus, instead of proceeding as on a specialty, with the legal presumption arising therefrom, cause the single demand under one legal head to be split into an indefinite number of demands under various heads.

As to those two bonds of this last named series, therefore, the recovery must be had under the count for money had and received; while on the other bonds the recovery will be had as on specialties, according to their tenor. The counts from 18 to 27, inclusive, are also on subscription bonds. To these bonds it is objected that the required assent of the voters was not obtained, because, though numerically the needed vote was given, yet the voters were not registered, nor did they take the oath prescribed by the state constitution of 1865. It was conceded, but if not, such is the fact, that the registration clause alluded to was not then in force. No doubt the prerequisite of the oath for qualification to vote was then in operation. Whether such oath was duly administered or not to each voter is doubtful, in the light of the testimony; and if not administered to all, how many voters failed to take it is still more uncertain. It seems that the vote was nearly unanimous in favor of the proposition; so that, if the inquiry were to extend to each vote, it might appear that the required number of qualified voters did assent to the subscription.

The ascertainment of the precise facts in this regard is considered unimportant, inasmuch as the ordinance under which these bonds were issued recites that the needed election was duly had, etc. If a recital on the face of the bonds estops the municipality, as held in all similar cases on municipal bonds, the same rule should obtain when the recital is in the city ordinance; for the reason of the rule is the same in both instances.

Two of said bonds are dated after the registry act of the state was in force, and therefore are not valid, as bonds, on their face. An effort was made to show, by the evidence, that they were delivered before, and post-dated; but the court finds otherwise. Hence, the recovery on those two bonds must be as for money had and received. As to the fourteenth count, the facts are, substantially, that the original bond was lawfully issued, and that the holder of said bond agreed to surrender the same and accept a renewal bond therefor. Said original bond was returned to the city, and what purported to be a renewal bond was issued in lieu thereof, but the latter bond was void, because the city failed to comply with the requirements of the then existing law. Hence, the original bond, being unsatisfied, remains a valid bond, on which a right of action can be maintained, such original bond being produced by plaintiff as the holder thereof.

There is a grave question of jurisdiction presented, relating to the plaintiff's interest in this suit. It seems that the bonds sued on, and the rights resulting from the assignment thereof, were transferred to the plaintiff, a citizen of Texas, for the purpose of having him sue thereon in a United States court — evidence concerning which was received, subject to the ruling of the court as to its admissibility under the issues. By the practice act of Missouri, as uniformly ruled, the holder of negotiable paper, to whom the same is transferred merely for the purpose of collection, can maintain an action thereon in his own name. But it is urged that if such transfer, or the assignment of a demand, negotiable or non-negotiable, is for the purpose of having the same adjudicated in a United States court, there is a fraud on the jurisdiction of the latter court. Such a question should have been presented by a plea in abatement. This case furnishes an apt illustration. The time of counsel and court has been occupied for a long period on the merits of this controversy, when, if a plea in abatement had been interposed, a few hours might have sufficed for its determination. If the court, through issues made by pleas in abatement

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or in bar, had ascertained that no jurisdiction exists, its judgment would be of dismissal without passing on the merits. There are, however, no *issues* in this case under which evidence of the kind, to defeat the jurisdiction, can be received. There is no time at command to analyze the varied learning on the subject, and the decided cases to which the learned counsel have referred. A few are referred to in a note to this opinion. If practicable, a special finding would have been made as to each count; but this opinion will clearly show the conclusions reached and the grounds on which the decision rests.

NOTE. — *Conrad v. The Atlantic Ins. Co.* 1 Pet. 450; *DeWolf v. Raband*, 1 Pet. 476; *Sims v. Hundley*, 6 How. 1; *Bailey v. Dozier*, 6 How. 1; *Smith v. Kernschen*, 7 How. 198. This covers the whole ground on the jurisdictional question.

Sheppard v. Graves, 14 How. 505; *Jones v. League*, 18 How. 76. These cases discuss the question at great length, both as to pleadings and colorable assignments.

Dred Scott v. Sandford, 19 How. 393. This case seems to have held, though by a divided court, that, whether the want of jurisdiction appeared through a plea in abatement or in bar, the judgment of the court must be a dismissal, and not a judgment on the merits. In the case on trial there is no plea, either in abatement or in bar, under which the question can arise; or, in other words, there is no issue in which any evidence on the jurisdictional point could be admitted. Subsequently there was the case of *Spencer v. Lapsley*, 20 How. 264, in which no reference was made to the *Dred Scott* case, but in which it was held that pleas in abatement and in bar, at the same time, were irregular.

Thompson v. Railroad Companies, 6 Wall. 134, does not establish a different rule. That states proceedings in a court of equity — an old and familiar rule, — and refers to the Ohio statute as to actions at law. In Missouri the real party in interest, or a trustee of an express trust, may sue.

UNION NATIONAL BANK OF CHICAGO v. GEO. DOUGLASS.

(District of Iowa. —, 1877.)

1. CORPORATION — CAPITAL STOCK. — The capital stock, property and assets of a corporation are to be deemed a trust fund sacredly pledged for the payment of the debts of the corporation.

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2. **SAME—RIGHT OF CREDITOR TO FOLLOW PROPERTY OF CORPORATION.**—Equity recognizes the right of a creditor of a corporation to pursue the property of the corporation into whose possession soever it may be transferred, unless it has passed into the hands of a *bona fide* purchaser. Stockholders are not entitled to any share of the capital stock nor any profits until the debts of the corporation are all paid.
3. **SAME—DIRECTOR, STOCKHOLDER.**—Where a director, who was also a stockholder, of an indebted corporation, as director aided in the passage of a resolution by which, as stockholder, he appropriated certain bonds which were assets of the corporation to his own use,—*held*, that he was liable to the creditors, as trustee, for the value of such bonds.

At the May term of this court the plaintiff recovered judgment against the Missouri & Iowa Construction Company for the sum of \$23,914.23.

Upon this judgment an execution was returned unsatisfied. Demand was made upon the officers of the corporation to disclose and turn out property. These officers failed and refused to turn out property or show any from which satisfaction could be obtained.

It is alleged that the defendant was a holder of fifty shares of stock of \$1,000 each, of which sixty per cent. only had been paid.

And it is averred that the sum of \$6,000 is due on said stock.

The petition alleges that defendant was concerned with other stockholders in the diversion of the funds of the company and in the payment of dividends, whereby defendant received \$20,000, etc.

The answer admits that the defendant is a stockholder to the amount of twenty shares, but denies that there remains unpaid and subject to payment of plaintiff's judgment an amount sufficient to pay off and discharge said judgment, but on the contrary avers that the whole amount of said stock has been paid, and that he is not indebted in any sum whatever to said construction company.

Resolutions of the board of directors, of whom Douglass was one, date of June 30, 1873, authorizing the president and

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treasurer to make an allotment of bonds of the St. Louis, Hannibal & Keokuk R. R. Co. to the stockholders of this company who had paid up all assessments theretofore made at the rate of \$1,000 in bonds for each \$600 paid in on stock, and at same rate on any new subscription or future assessments as the same are paid; but in order to equalize the payment on old and new subscriptions, and in payment of interest to the original subscribers, the allotment of bonds to them on all subscriptions made prior to January 1, 1873, shall be at the rate of \$1,000 in bonds for each \$500 paid in on assessments heretofore called in; also that the first three coupons from all of said bonds before they are given out, and that the receipt to be given by the stockholders for said bonds shall contain an agreement that said bonds shall not be offered for sale at less than ninety cents on the dollar without the consent of the president, etc., of the St. L., H. & K. R. R. Also, that an allotment of stock of the St. L., H. & K. R. R. be made to the stockholders of this company, at the rate of eight shares of stock with each one thousand dollar bond, as herein provided. Also, that said president and treasurer be authorized to cancel the remaining unpaid subscriptions of any subscribers who choose to have them so cancelled, on condition that the allotment of bonds to such subscribers shall be at the rate of \$1,000 in bonds for each \$600 paid in on stock.

At another meeting of directors, at Cedar Rapids, August 7, 1875, it was resolved that an assessment of thirty per cent. on the capital stock of the company should be called in, payable as follows, viz.: Ten per cent. on the 1st day of October next; ten per cent. the 1st day of November next; ten per cent. the 1st day of December next. Another resolution, moved by Wisner and seconded by Douglass, was adopted, as follows:

"Whereas, this company, by a resolution adopted June 30, 1873, provided for the allotment of stocks and bonds of the St. L., H. & K. R. R. Co. to the subscribers of this company; and, whereas, allotments were made under said resolution; and, whereas, it has been evident that this company

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cannot procure the means and materials to furnish said road unless said bonds are returned to this company; now, therefore,

“Resolved, that the treasurer is hereby authorized to receive from the stockholders who desire it, the first mortgage bonds of the said St. L., H. & K. R. R., at thirty-seven and one-half cents on the dollar, in payment of said assessment, and stockholders who desire are permitted to pay up the whole thirty per cent. at any time in advance of its becoming due.”

The secretary of the company, Mr. Buchanan, testifies that the credit of \$6,000 upon the company's books to Douglass was for bonds returned under this resolution.

Buchanan further says that the indebtedness of the construction company, June 30, 1873, was about \$56,771.11, and this includes the notes payable to H. G. Angle, due in May or April, 1874, upon which the judgment referred to above was founded, and that he knew of no assets that the company had aside from the unpaid stock and work they had done on the railroad in Missouri, except \$12,500 of bonds due the company from Lincoln county, Missouri. Also, that the work done on the road in Missouri amounted to \$581,215.83.

This witness also testified that the construction company owes in the aggregate \$175,559.66; that is, at the time B.'s deposition was taken, exclusive of Blair's claim for iron for thirteen miles of the road.

Blair's claim is \$21,071.64, which added to \$175,559.64, which added to \$175,559.66, gives total of indebtedness.

Douglass returned his bonds at thirty-seven and one-half cents on the dollar.

Sixteen thousand dollars in bonds were returned by defendant at thirty-seven and one-half cents on the dollar.

The bonds were worth fifty cents when allotment was made.

Bonds to the amount of \$394,000 were allotted under the resolution of 1873.

Nourse & Kauffman, for the plaintiff.

Hubbard & Deacon, for the defendant.

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LOVE, *District Judge*.—No doctrine of equity is more firmly established upon solid foundations of reason and authority, than the principle that the capital stock, property and assets of a corporation are to be deemed a trust fund sacredly pledged for the payment of the debts of the corporation.

This doctrine was most forcibly expounded by Judge STORY in the case of *Wood v. Dummer*, reported in 3 Mason, 308. That case grew out of the insolvency of the Halowell and Augusta Bank, in which the defendant, a stockholder, withdrew from the bank his proportion of stock, when the bank was indebted on bills previously issued.

Judge STORY, among other things, said that he "viewed the stockholders as having the full benefit of the profits made by the establishment, and as being unable to take any portion of the fund until all the other claims on it were extinguished, and that their rights were not to the capital stock, but to the residuum, after all demands were paid; and further, that upon a dissolution of the corporation, although the billholders and stockholders had each equitable claims, yet those of the billholders had the prior equity. On the principle, then," he continued, "that the capital stock was a trust fund, it was clear that it might be followed by creditors into the hands of any person having notice of the trust attached to it, and that as to the stockholders themselves there could be no pretense to say that in law and in fact they were not affected by the most ample notice."

Judge STORY laid down the same doctrine in *Mumma v. Potomac Co.* 8 Pet. 286.

In *Curran v. The State of Arkansas and others*, reported in 15 Howard, the supreme court of the United States held that on the dissolution of corporations its effects are a trust fund for the payment of its creditors, who may follow them into the hands of any one not a *bona fide* creditor or purchaser, without notice; and a state law which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts and is invalid; and the fact that

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a state is the sole owner of the stock of a corporation does not affect the rights of its creditors. And Judge CURTIS, in delivering the opinion in this case, quotes with approbation from Story's Equity the following language:

"To this head of implied trusts we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it in preference to any of the stockholders of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid; and if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share would, in equity, be held liable *pro rata* to contribution to discharge such debts out of the funds in his hands."

And Judge CURTIS adds, that in conformity with this doctrine the following cases were decided in the state courts:

Wright v. Petrie, 1 Smedes & Marsh. Ch. Rep. 319; *Nevit v. Bank of Port Gibson*, 6 Smedes & Marsh. Ch. Rep. 513; *Hightower v. Thornton*, 8 Geo. 493; *Nathan v. Whitlock*, 3 Edwards' Ch. Rep. 215; affirmed by the chancellor in 9 Paige, 152.

In *Nathan v. Whitwell*, 9 Paige, 152, the case was that the directors of an insurance company agreed among themselves to take a majority of the stock and to give their stock notes for the same, secured by an hypothecation of the stock, and after the company had become embarrassed, one of the directors agreed with the president to give him \$6,000 if he would take his stock and substitute his own note in lieu of the stock note of the director, which was accordingly done. It was held to be a fraud upon the creditors of the company and the other stockholders who had paid their stock, and an action was sustained against the director upon the note delivered up. The court held that in all cases where the capital stock or assets of a corporation have been distributed to the stockholders without providing for the payment of the debts, a court

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of equity will allow the creditor to sustain a bill against the shareholders to compel contribution to the payment of the debts of the company to the extent of the funds obtained by them, whether directly from the company or through some substitution of useless securities for those that were good.

In *Sawyer v. Hoag*, 17 Wallace, the court said: "A nominal payment by stockholders is no payment as to creditors." Again, in *Sawyer v. Upton*, the supreme court of the United States held that: "A resolution or agreement that no further calls be made is void as to creditors, and an agreement that stockholders may pay in any other medium than money, is void as a fraud upon other stockholders and upon creditors." And further, that "the capital stock of an incorporated company is a fund set apart for the payment of debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied. The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced, and subject it to the payment of their claims, etc. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it." But perhaps the strongest application of this doctrine is to be found in the *Railroad Co. v. Howard*, reported in 7 Wallace, 392.

It will be remembered that in that case, which was a railroad foreclosure, it was quite manifest, and in fact not denied, that mortgaged property was wholly insufficient to pay the bonded debts, and that, in fact, upon a regular foreclosure there would have been nothing whatever to apply in payment of the general and unsecured creditors. The Chicago & Rock Island Railway Company proposed to purchase the mortgaged property for the sum of \$5,500,000, if the title could be obtained without delay, so as to enable them to prosecute the building of the road speedily and secure a land grant which might otherwise be lost. As this was a proposition exceed-

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ingly favorable to the interests of the mortgage bondholders, they, in order to allay the apprehended opposition of the stockholders to a foreclosure, entered into an agreement to abate a certain percentage from their respective claims, in order to set aside sixteen per cent. of the purchase money for the benefit of the stockholders. The foreclosure and sale having been accomplished, the general or unsecured creditors came into equity and claimed as against the stockholders the fund arising from this sixteen per cent., and this court held without hesitation that the general creditors were entitled to that fund. Upon appeal, it was contended in the supreme court that there was no pretense of fraud as against the stockholders, and that the substantial rights of the general creditors were not in the slightest degree affected, since it was admitted that the mortgaged property was insufficient to pay the secured creditors, and that the sixteen per cent. fund resulted solely from their voluntary agreement to abate in favor of the stockholders a part of what they had a perfect right to demand and appropriate as against the general creditors. The supreme court, however, without dissent, affirmed the decree below.

And Judge CLIFFORD, speaking for the whole court, said that "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that the stockholders are not entitled to any share of the capital stock, nor any dividend of the profits, until all the debts of the corporation are paid." The code of 1873, section 1072, provides that "the payment of dividends that leave insufficient funds to meet the liabilities of the corporation shall be deemed such a fraud as will subject those therein concerned to the penalties of the preceding section, and such dividends, or their equivalents in the hands of individual stockholders, shall be subject to such liabilities." (As to the remedy here adopted, see 40 Iowa, 650; Code, 1082, 1083, 1084.)

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The defendant in the case now before the court was both a director and stockholder of the indebted corporation. As a director he aided in the passage of a resolution by which, as a stockholder, he appropriated the bonds in question, which were assets of the company, in a certain proportion to his paid up stock. This was a wrongful act on his part. It resulted in diverting to his own use a part of the trust property which he as a trustee was bound to apply to the payment of debts. This he had no right to do, so long as the debts remained unpaid. The diversion of the trust fund was a breach of trust and a fraud upon creditors. As against the creditors he thereby acquired no title to the bonds in question. A trustee can certainly acquire no title to any part of the trust fund for his own use by a breach of trust and a fraud upon creditors. The defendant, notwithstanding the transfer of bonds to himself, stood seized of them, subject to the trust in favor of creditors. The creditors had a perfect right to pursue the bonds in the hands of the defendant, and have them applied in payment of their claims against the corporation.

This defendant, in the next place, as a director of the corporation, assisted in the passage of a resolution by which an assessment was made of thirty per cent. upon the capital stock of the company, and another resolution, providing that the treasurer should be authorized to receive from him and others, in payment of this assessment, the very bonds which they had wrongfully appropriated. The defendant did not own the bonds with which he paid up his stock. These bonds were the property of the corporation, in trust for the creditors. The defendant paid what he owed the corporation by the delivery of bonds which belonged to them. He gave to the company, and to the creditors through them, in payment, a part of the company's own assets — bonds to which he had in equity no title whatever; and this he now pleads as payment. It may be presumed that any delinquent debtor would not fail to pay his debts, if his creditors would furnish the means to do it with. Such a course of dealing would soon bring about

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a business millenium — a state of absolute freedom from all indebtedness.

Now there certainly can be no doubt that the creditors of a corporation are entitled to have the whole of the assets of the company applied to the payment of their debts, and not merely some part thereof. In the present case both the bonds and unpaid stock were assets. The bonds were the result of work which the construction company had done for the railroad company. The money resulting from the paid up stock had been expended in the work, and took the form of bonds. The bonds were beyond question assets, and so was the unpaid stock. Now what did the creditors get by the transaction in question? Did they get both the stock and bonds applied to the payment of their claims? Clearly not. They got the bonds only. The unpaid stock was extinguished by the delivery of the bonds. In other words, the stock was paid with the bonds, and nothing was realized from the unpaid stock except what the company had before, namely, the bonds. It is precisely as if this defendant, by a resolution of his own, had taken cash from the company's treasury, and immediately paid it back in liquidation of his assessment. Suppose the sixty per cent. which had been paid by the stockholders upon previous assessments had remained in money in the treasury, and suppose the directors had ordered the treasurer to deliver of this money so much to the stockholders as would be sufficient to pay the thirty per cent. assessment. What would equity have said to such a transaction?

The result of such a transaction would clearly have been the extinguishment of ninety per cent. of the stock by the payment of sixty per cent. In other words, the thirty per cent. assessment would have been paid with the company's own money.

It is said that the company was solvent when the allotment of bonds was made. If so, the allotment must have resulted in the insolvency of the corporation, since we find that debts exist, amounting to \$196,631.30, for which no provision seems

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to be made. Such an argument is suicidal. It kills itself. Surely if the law permitted the stockholders of a corporation to pay up their stock, and then appropriate an equal amount of the assets before the payment of debts, it would open the way to the universal insolvency of corporations! Such a doctrine would give absolute impunity to fraud upon the creditors of corporations, and utterly discredit them in the financial world.

The truth is that it makes no difference whatever whether a corporation is solvent or insolvent, so far as the doctrine is concerned that the property is a trust fund which cannot be withdrawn or appropriated by the stockholders until the debts are paid.

Judgment for plaintiff.

SWENSON v. HALBERG and another.

(District of Minnesota. March, 1880.)

1. FORECLOSURE BY ADVERTISEMENT — NOTICE OF SALE — CLAIM FOR ATTORNEY'S FEES.—The insertion of a claim for \$50, for attorney's fees, in the published notice of a foreclosure sale, under a statute of the state of Minnesota, where the mortgage only stipulated for the payment of \$25 for attorney's fees, in the event of such foreclosure, will not invalidate a sale made in accordance with such notice, in the absence of fraud and prejudice to the mortgagor or owner of the equity of redemption.
2. SAME — SALE OF SEVERAL TRACTS IN ONE PARCEL. — The sale of several tracts in one parcel, contrary to the provisions of such statute, will not be disturbed, in the absence of fraud and prejudice to the mortgagor or owner of the equity of redemption.
3. HOMESTEAD — SALE UNDER FORECLOSURE — REDEMPTION BY ASSIGNEE IN BANKRUPTCY. — The redemption of a homestead from foreclosure sale by an assignee in bankruptcy does not enure to the benefit of the bankrupt and his assigns.

Davis, O'Brien & Wilson, for plaintiff.

Geo. L. & Chas. E. Otis, for defendant.

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NELSON, *District Judge*. — The plaintiff brings his action of ejectment to recover the property hereinafter described, which is tried by the court without a jury.

It is admitted the plaintiff, on December 26, 1864, was seized of the property described as block five (5) in the platted town of "Centre City," in the state of Minnesota. On that day he conveyed it to Louis Shogren and John Shogren, together with lots 1, 2, 3, 4 and 5, in block 4, in that town. On July 17, 1868, Louis and John Shogren gave a mortgage of all this property to J. N. Castle, who assigned it to H. F. Noyes, October 10, 1868. This mortgage was foreclosed by advertisement under the laws of Minnesota, and on April 23, 1870, the mortgaged property was sold at public auction, and was bid in by H. F. Noyes, to whom a certificate was given by the sheriff, dated May 12, 1870. The sale, however, was subject to the redemption provided by law. The property was sold by the sheriff in a body, not in separate lots or tracts, and the published notice of foreclosure sale, in specifying the amount claimed to be due, included therein the debt, interest, and \$50 attorney's fees, whereas the mortgage, in terms, stipulated for \$25 attorney's fees. Two certificates were issued to the purchaser — the first, executed by the sheriff, but not in his official capacity; the second, properly executed, to cure defects. The second certificate, of the same date as the first, was assigned on June 25, 1870, by H. F. Noyes — one-half to Louis Torenus, one-fourth to I. E. Staples, and one-fourth to W. G. Bronson. All the aforesaid instruments were duly recorded.

On May 12, 1869, John Shogren and wife executed a deed of the property embraced in the mortgage to Louis Shogren. Louis Shogren was adjudged a bankrupt June 14, 1870, on a petition filed on the third day of the same month, and Enoch Horton was appointed assignee, and an assignment was made to him of the bankrupt's estate, by the register in bankruptcy, August 16, 1870, and he filed a certificate of exempt property on August 23, 1870. Torenus, Staples and Bronson submitted exceptions to this certificate, and after argument, on February

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18, 1871, an order was entered setting aside the designation of exempt property, deciding that block five (5) was the homestead of the bankrupt, and directing the assignee to set it aside. On May 19, 1871, the bankrupt and wife conveyed block five (5) to the plaintiff, and under this deed he claims title.

Horton, the assignee, having first obtained an order therefor from the court, redeemed from Torenus, Staples and Bronson, who held the certificate, the property mentioned therein, including block five (5), on April 21, 1871, three days before the equity of redemption vested in the bankrupt expired. He was compelled to pay to them the full amount, as the property was originally sold in one body, and to redeem with the other premises block five (5), the homestead, in which the bankrupt had an equity of redemption only.

The time for redemption by the bankrupt expired April 23, 1871, and no steps were taken by him to perfect his title to block 5, thus set apart to him as a homestead. He allowed the time for redemption to lapse, and the assignee obtained an order June 20, 1871, to sell the property in block 4. He, however, sold not only this property, but block 5 also, which was not included in the order, and on October 23, 1872, the sale was confirmed. At this sale all the property was purchased by Torenus, and the assignee executed to him a deed October 3, 1872. Torenus conveyed to the defendant Halberg October 23, 1873, and Halberg conveyed to defendant Peterson May 12, 1873. This controversy is with reference to the title to block five (5).

The plaintiff urges: *first*, that the foreclosure and sale under the advertisement was void, for the reason that a larger attorney's fee was claimed than stipulated in the mortgage; *second*, that the same was void for the further reason that the property was not sold in separate parcels, or tracts, as the statute required; *third*, that the redemption of the homestead from the sale enured to the benefit of the bankrupt and his assigns, and satisfied and cancelled the mortgage, and all title derived under it.

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It is sufficient to say, upon the first two propositions, that the foreclosure was regular. There is no fraud charged, and it does not appear that the other party was prejudiced by the insertion of \$50, instead of \$25, as attorney's fees. The mistake is not such as will disturb the sale; neither will it be set aside for the reason that the tracts were not sold separately. The section of the law requiring the sale of separate and distinct tracts in separate parcels is directory, and the sale will not be disturbed unless it was sold fraudulently, or it is shown that the mortgagor or owner of the equity of redemption was damaged thereby. 24 Minn. R. 281. It does not appear that the sale of the separate tracts in a body was the result of actual fraud, and it is not shown that Shogren was prejudiced thereby. He made no effort, as before stated, to secure his homestead, which was subject to the mortgage.

The third proposition cannot be sustained. The assignee redeemed the mortgaged property from the foreclosure sale, by virtue of the bankrupt law, under the order of the court. The equity of redemption to a portion of the mortgaged property was vested in the assignee as the representative of the estate of the bankrupt, and, under the authority of the bankrupt act, he was ordered to redeem. The rule in this state is, that a person having an equity of redemption in a part of real estate sold may redeem from the sale, and this property being sold in a body and for one price, the assignee was compelled, in order to redeem the only property to which he had any right, to pay the full amount of the bid, and take a certificate of redemption for the whole property. In doing this he took, by the redemption, block five (5), subject to Shogren's right to redeem from him. He was not authorized by this order of the court to redeem for the benefit of any but the creditors of the bankrupt, and Shogren's equity of redemption in block five (5) was not destroyed.

The assignee is not governed by the state statute regulating the proceedings necessary to be followed by a mortgagor or creditors in redeeming. Of course the law prescribing the

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time within which the right of redemption can be exercised will apply, and it cannot be extended by the bankrupt courts. Having full control over the bankrupt's estate after adjudication, the law itself and the spirit and object of it govern the court in the exercise of its jurisdiction, necessary "to collect all the assets of the bankrupt, * * * liquidation of liens, * * * and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties," etc. Section 1, Bankrupt Law.

It is the duty of the bankrupt court to protect the rights and interests of the bankrupt, as well as the creditors, and secure to the former all the law allows in the way of exemptions, but no more. The assignee had no title by virtue of the assignment to him, to the block five (5), which was declared to be the homestead.

The decision of the bankrupt court did not enlarge the present interest of the bankrupt in this homestead. His right, title and interest therein were only an equity of redemption, and by the redemption from Torenus and others the assignee held this block subject to this right, and the bankrupt, by proper proceedings, could have had his interest adjusted before he lost it. His homestead right in block 5 was fully recognized by the court two months before the time for redemption expired, and the bankrupt made no effort to ascertain the amount necessary to redeem it.

The homestead exemption act (Minn. Rev. St. § 2) provides that "such exemption shall not extend to any mortgage thereon lawfully obtained." The bankrupt court, on application, in marshalling the assets, would have, by appraisal or otherwise, fixed the sum necessary to be paid, in order to entitle the bankrupt to the homestead, free from all liens.

Instead of applying to the court, the bankrupt allowed his right of redemption to expire, and therefore the plaintiff took nothing by the deed executed May 12, 1871.

Judgment will be entered in favor of the defendants.

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CHAS. B. FOOTE v. THE CITY OF MOUNT PLEASANT.

(District of Iowa. October, 1878.)

1. MUNICIPAL CORPORATION — CORPORATE BONDS. -- Where a city has power to subscribe to the stock of a railroad company and to issue bonds in payment of the subscription, the proceeds of such bonds in all cases to be expended within the limits of the county in which such city is situate, *held*, that as between the city and the railroad company, or its assignee with notice, such bonds cannot be enforced where no part of the proceeds of the subscription has been expended in the county, and no part of the railroad subscribed to has been constructed therein.
2. FORECLOSURE OF MORTGAGE UPON A RAILROAD — RIGHTS OF PURCHASER. — The owner of certain first mortgage bonds upon the K., Mt. P. & M. Railroad, including all its "property, real and personal, and all rights and interests therein now owned or hereafter to be acquired," proceeded to foreclose the mortgage, and obtained decree under which he purchased the property. The mortgage provided that the bonds secured by it should in no case be issued or disposed of except at the rate of \$3,500 for every mile of road *as completed*. *Held*, that as to the bonds issued by the city of Mt. Pleasant, under the circumstances named above, the purchaser at sale under the decree did not become a *bona fide* holder, with right to sue and recover.
3. DECISIONS OF HIGHEST STATE COURT AS TO VALIDITY OF MUNICIPAL BONDS. — The supreme court of the United States has held that bonds issued while a decision of the supreme court of Iowa holding in favor of the power of the corporation to issue the same, remained in force, will be upheld as valid, notwithstanding a later decision the other way; but as to bonds issued after the promulgation of the later decision, the supreme court of the United States will accept and follow the decision of the supreme court of this state.

The facts sufficiently appear in the opinion of the court. The cause was submitted to the court,—a jury having been waived.

H. Scott Howell and *J. G. Anderson*, for plaintiff.

Woolson & Babb, for defendant.

DILLON, *Circuit Judge*.—I have no time to write an opinion in this case, but for the information of counsel, some of whom are not present, I will direct the stenographer to take down what I say.

This is an action by Chas. B. Foote against the city of Mt. Pleasant, involving the validity of \$50,000 of bonds issued by

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the defendant city to what was known as the Keokuk, Mt. Pleasant and Muscatine Railroad Company, and the right of the plaintiff to recover on these bonds.

The defenses to the suit are four-fold:

First. Denying that the plaintiff is the owner and holder of the coupons sued upon, or any part of the same, or that he has any interest therein.

Second. That the bonds were issued without authority of law and are illegal and void.

Third. That the bonds were issued upon the express condition that the proceeds should be used solely for work on the railroad to be done in Henry county, Iowa, and that the plaintiff had full knowledge of that fact; and that they were never so issued as to entitle the plaintiff to the rights of an innocent holder of the bonds or coupons for value; and if he ever held the same, he has parted with all interest therein.

Fourth. That the said bonds and coupons have been fully settled and satisfied by the defendant city, and have been paid and cancelled.

The case is submitted on an agreed statement of facts, from which it appears briefly as follows:

In 1857, under a provision in the charter of the city of Mt. Pleasant, the question was submitted to the legal voters, whether they would authorize a subscription by the city of Mt. Pleasant of \$50,000 to the capital stock of the Keokuk, Mt. Pleasant and Muscatine Railroad Company.

This submission was pursuant to section 28 of the charter, which is as follows:

"The said city shall have power to subscribe to the capital stock in any railroad company, and may pay the same with the bonds of the city, and shall be empowered and required to levy and collect all the necessary taxes to pay the principal and interest on such bonds; provided such subscription shall be authorized by a majority of the legal voters of said city cast at an election ordered for that purpose."

At the time when this vote was taken, in August, 1857, the general law of the state had authorized counties, cities and

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incorporated towns to aid railroad companies by subscription to their stock, and to issue bonds. This act contained a provision as follows:

"And the proceeds of such bonds shall in all cases be expended *within the limits of the county* in which the said city may be situated."

In the proposition submitted to the voters was this provision:

"Such bonds shall be issued only on the guaranty that the money *shall be expended in the county of Henry*, in the construction of said road."

So that the general law of the state, and the specific submission to the voters, alike provided that the proceeds of the bonds were to be expended in the construction of the road in Henry county.

That vote was taken in August, 1857, and it resulted in favor of the proposition. In November, 1857, the city council authorized the issue of the bonds of the city, pursuant to that vote, for the sum of \$50,000, to aid this railroad company, on receiving the guaranty of the railroad company that they would expend the money (the proceeds of these bonds) in Henry county. The city accepted the unsecured obligation of the railroad company that they would do so. The city bonds were accordingly issued and delivered to the railroad company.

In September, 1860, the railroad company resolved on the execution of a deed of trust or mortgage of the railway (a mortgage, in short, we may call it), on their entire line of road and property, present and future, to secure a large amount of bonds of two classes, one called the "First Mortgage Sinking Fund Bonds," and the other the "First Mortgage Bonds." The mortgage contained this provision, which it is important to notice, viz.: That in no case shall the bonds of the first class (that is, the First Mortgage Sinking Fund Bonds) be issued and disposed of except at the rate of \$8,500 for every mile of road *as completed*, nor the bonds of the second class, except at the rate of \$7,000 per mile of road *as completed*.

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Now, the plaintiff's claim to the ownership of city bonds rests on two fundamental propositions. One is, that they were embraced in this mortgage. The other is, that being so embraced in the mortgage, they passed to him by virtue of the subsequent decree of foreclosure of the mortgage, and that he thereby has obtained title to them.

This mortgage was made in 1860, and the language in respect to what it covers is in this wise: "Locomotives, tenders, rolling-stock, fuel, machinery," etc., and it proceeds thus: "and all other property, real and personal, and all rights and interests therein now owned or hereafter to be acquired by the said parties," etc.; and it concluded with this reservation, among others: "and reserving also to the said railroad company full power to sell, convert and dispose of any city, county or other bonds or securities received in the payment of stock, or donated to the construction of the said railroad, and to collect subscription of stock: provided no default shall occur in the payment of interest on said bonds and to the sinking fund herein provided and required," etc.

That mortgage was recorded, as it appears, only in the county of Lee, in the records of *land* mortgages.

Afterwards the company went on and built eighteen miles of road in Lee county, and had completed only that amount of road at the time the war of the rebellion broke out, at which time the company ceased its operations and became insolvent.

The *county* of Henry had voted \$100,000 of their bonds, concerning which the stipulation reads as follows: "Said company (the railroad company) has also received a subscription from Henry county of \$100,000 in bonds, and it had agreed with Henry county to expend that amount in Henry county, which said bonds had *been sold* by the company."

It is agreed *that no road was ever built in Henry county*; that only eighteen miles was completed in Lee county; and that the railroad company had done work in Henry county only to the amount of \$34,000.

In other words, very much less than the amount of work

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which they were required to do, in respect to the \$100,000 of bonds which they had received from the county of Henry; so that we may say that no part of the \$50,000 here in controversy was ever expended in Henry county, as required by the law of the state and by the specific vote that was taken.

This \$50,000 of bonds were delivered to the railroad company prior to the execution of the mortgage, and after the mortgage they were left in the possession of the railroad company, which afterwards delivered these bonds to Mr. J. Edgar Thompson, one of the trustees in the mortgage; but it is stipulated that Thompson received these bonds *not* in his capacity as trustee, but as a bailee of the railroad company; so that, in short, these bonds remained always with the railroad company, as well after the mortgage as before.

I have stated that the railroad ceased to do work and became insolvent in 1861, and this was the condition of affairs:

The city had these bonds for \$50,000 outstanding and in the hands of the railroad company; the company was insolvent, and all work had been suspended; there was no road completed in Henry county, and no prospect of any being completed.

In 1862 the supreme court of the state of Iowa decided, in the case of the *State in rel. Wapello, etc.* 13 Iowa, 388, which was followed in the next year by the case of *Myers v. The County of Johnston*, 14 Iowa, 49; *McMillan et al. v. Boyles et al.* 14 Iowa, 107; *Ten Eyck v. Mayor of Keokuk*, 15 Iowa, 486, and *Smith v. Henry County*, 15 Iowa, 385, that under the constitution of the state it was beyond legislative competency to authorize municipalities to aid railroad companies by subscription to their stock and the issuing of bonds, and that was accepted in the state of Iowa as the settled law on that subject.

In 1865 the city of Mt. Pleasant instituted a suit in one of the local courts, making the railroad company, Mr. Foote, the plaintiff here, and others defendants, and praying that the bonds be ordered to be surrendered to the city and cancelled. That was in September, 1865. In October, 1865, a new element was

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introduced: A Mr. Lash, who had been vice president of the railroad company, went before the city council and made the proposition that if they would appoint him as agent, he would take up and procure to be surrendered to the city the \$50,000 of bonds, which, with interest, then amounted to about \$70,000; and they appointed him agent for that purpose. Here comes the controversy between Lash and the city, as to his relations to the city and to the railroad company, and the supreme court of the state decided that Lash was the agent of the city to procure these bonds.

The city issued to Lash warrants to the amount of \$6,000, with which he was to pay \$1,000 of the old debts of the railroad company, and was to use the others in forwarding the affairs of the railroad company.

The supreme court decided that Lash was the agent of the city to procure these bonds. He had procured them in October, 1865, and brought them into the city council and surrendered them, whereupon (and which is, I think, the most sensible thing I have seen in the whole controversy) some gentleman moved that *having got the wolf they ought to kill him on the spot, and the council proceeded to burn the bonds.*

In the following April, 1866, Mr. Foote, the plaintiff in this suit, having and being the owner of 244 of the first mortgage sinking bonds, and 202 of the first mortgage bonds, which it is stipulated were issued as this road was built mile by mile for the eighteen miles completed in Lee county, brought his bill to foreclose this railway mortgage, making defendant to that bill, the trustees, Mr. Thompson and Mr. Hooper, and all the other bondholders; and such proceedings were had as that Foote obtained a decree in his favor for \$318,000, in May, 1866, and the other bondholders for \$38,000, and Edward Kilbourn, the lessee of the company, a decree for \$364,000; and one question is, whether under that decree the bonds of the city are included in the property ordered to be sold. I will read the decree so far as it relates to the description of the property ordered to be sold. (The city of Mt. Pleasant, I

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may remark, was not a party to that foreclosure.) "The superstructure, iron rails, water tanks, rolling stock, fuel, material, track, and all franchises, rights and privileges, and all rights of way over lands belonging to the said railroad company;" and the following clause is the one on which the plaintiff relies for title: "or in any of which things said railroad (or said railroad company) have any interest or claim, and in all other property of the said railroad company, whether real, personal or mixed, or in which they have any interest or claim, being as well for the payment of the bonds issued by the said railroad company, and the other claims against the said property."

Under that decree there was a statutory appraisement of the specific property, locomotives, cars, etc., owned by the railroad company, amounting to \$91,000, and an omnibus valuation of the railroad track, and all other property, real, personal and mixed, in which the company had any claim, amounting to \$459,000. In other words, the bonds here in controversy, issued by the city of Mt. Pleasant, are not mentioned in terms as being conveyed by the mortgage, nor are they mentioned in the decree, or in the appraisement, or in the deed, but they are claimed to be covered by the general language, "any and all other property, real, personal or mixed, belonging to the corporation."

Now the question is whether on this state of facts, Mr. Foote has a claim to these bonds, as a *bona fide* holder thereof without notice of the rights and equities of the city.

We are of opinion that he is not such a holder, for several reasons. In the first place, it would be very improbable that a railroad company, having received bonds issued by a municipality for the express purpose of sale and negotiation by it, to aid it in the construction of its road, would embrace those bonds in a railway mortgage, and thus sink that much of the ready means intended to enable them to build the road, by putting them in an omnibus mortgage of this kind. The most natural course would be that these bonds should be sold.

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They were made for that purpose — made to be negotiated in the usual way. There ought, therefore, to be very clear language to justify a court in holding that the railway company intended to include these bonds in a mortgage.

The language here is general, and in one view it is broad enough to cover these bonds.

In a more narrow view these bonds would not be held not to be embraced in it. What is best to guide the court as to the *intention* of the parties, for that should govern. To guide us, let us look at the practical construction the parties put upon this transaction. Now, if the bonds were intended to be included in the mortgage, it would seem to be very natural that they should be delivered to the trustee, but they were not. On the contrary, as I have stated, they always remained in the possession of the railroad company. Not only so, but the trustee, Mr. Thompson, an experienced business man, undoubtedly faithful to his trust, and, in 1865, when the president of the railroad company sent an order, on him, to surrender these bonds to the city, he set up no claim to them. He did not say that these bonds belonged to this trust property, but he surrendered them to the agent of the city, thereby recognizing the fact, as he understood it, that they were not embraced in the mortgage.

Then again, here is a property which at the time of this foreclosure amounted to seventy or seventy-five thousand dollars, and while the decree mentions everything else, down to "spikes," in infinite detail, these bonds are never mentioned anywhere in the proceedings.

But the plaintiff relies upon an implication arising out of the reservation in the deed of trust that the city might sell these bonds until default in the payment of interest. Now whatever effect that might have, one thing is manifest, namely, that it appears from that very reservation that there was no intention here to pass to the mortgagees, or to the trustee representing the bondholders in this mortgage, an absolute and full title to these bonds. That is not the negotiation of a

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security in a commercial sense, so as to cut off any equity, leaving it in the possession of the owner with power to sell; so that, in our judgment, Mr. Foote never obtained any title to these bonds in a commercial sense, so as to defeat defenses, even admitting the language of the mortgage is broad enough to embrace them. That is one ground on which we think the suit must fail, but there are others that seem to our mind equally conclusive.

We have already adverted to the fact that the statute required the proceeds of these bonds to be expended in the county of Henry, and not only so, but the specific proposition submitted to the people of the city of Mt. Pleasant was that these bonds should be thus expended; and the railroad company executed its obligation agreeing to thus expend them; so that we have the statute of the state, and the specific proposition voted on by the people of the city, and also the obligation of the railroad company, all concurring that the money arising from the sale of these bonds, "the proceeds of these bonds," in the language of the law, should be expended in Henry county. Now what does this contemplate? It contemplates the negotiation of these bonds in the ordinary and usual way, and the keeping of the proceeds separate from the other assets of the company, and that the proceeds when obtained shall be expended in the county of Henry. Fundamentally this was the inducement to make the vote. What did the railroad company do? They received these bonds (and on the plaintiff's theory, for I am now discussing it in the view that he may be right and that this broad language is sufficient to include these bonds in the mortgage), and commenced their work in Lee county. They make a mortgage, and include these city bonds in it to raise money in gross.

If that transaction can be sustained, then it is very evident you can never tell how much money was obtained specifically on these bonds. It is very evident that the mortgagee made no specific advance on the faith of this security; and therefore to allow a recovery here would be to subvert the law, and the

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obvious intention of the law, and the express contract of these parties. The utmost effect, it seems to us, that can be given, would be that the right of the mortgagees would be dependent on the railroad company getting a perfect and complete title to these bonds. If the railroad should expend any amount of money equal to this amount of bonds specifically in Henry county, perhaps there would then be an equity on their part to hold these bonds and recover on them; and if they, before that time, had pledged them to the mortgagees, when the railroad company's right became perfect, the pledge would enure to the benefit of the mortgagee.

But in that view of it, the mortgagees have taken them subject to all the equities of the city and railroad company. It is obvious that the railroad company never obtained any rights to these bonds, because the money was never expended in the county of Henry, or any part of it.

But suppose we are mistaken in this view. There is another ground which seems to us equally fatal to plaintiff's right. The language of this decree, ordering the sale, is *in presenti*. It did not include these bonds, for the reason that at that time the bonds had been surrendered to the city, and were no longer in existence. They had been destroyed. It cannot be held, under a sweeping provision of the mortgage, mortgaging all property, real, personal and mixed, not in possession, and thereafter to be acquired, that seven or eight years afterwards, when the railroad company has parted with a large amount of personal property under a *jus disponendi* reserved to it; that this decree *in presenti*, ordering the sale of all the personal property of the railroad, can relate back and divest titles acquired under the railroad company when they had the power of sale and disposition. Our judgment is, this decree is not broad enough to cover these bonds, they being no longer in existence at the time the decree passed, and it being known to the plaintiff that such was the fact; for Mr. Kilbourn concurred in the surrender of these city bonds, and he, as the agent of Foote, obtained a foreclosure, and

knew that the bonds had been surrendered. He made no effort to impeach that transaction at the time of the foreclosure.

But suppose we are mistaken in this view, there is another equally fatal to the plaintiff's right, namely: That under the circumstances of this case, the surrender of these bonds is binding on all parties. How does the case stand? The city had made a subscription of \$50,000 to this railroad in violation of the law of the state, as expounded by the supreme court of the state. The bonds had never been executed to the railroad. The city had subscribed to the stock in the books of the company, but the city still held the stock of the company. The company still held the bonds of the city, and the railroad company had become insolvent; had ceased to do any work. Seeing they were unable to carry out their contract to expend the proceeds of those bonds in the county, the city filed its bill to cancel this subscription and to have the bonds returned to it. It is plain that the city was entitled to have that done. Mr. Howell in his argument mistakes the decision of the supreme court of the United States. He says: "It is unnecessary to argue to this court that these subscriptions to railroad corporations are valid," etc. Such is not the effect of the decisions. The supreme court of the United States simply hold that since the supreme court of the state of Iowa had in 4th G. Greene decided that such bonds might be constitutionally issued while such decision remained in force, they would be sustained in the hands of *bona fide* holders, but as to bonds issued, *after that decision was overruled*, the supreme court of the United States will accept the decision of the supreme court of the state on that subject. Now, there were no *bona fide* holders of these bonds at the time the surrender was made. The railroad company was not such. The city held the stock, and the supreme court of the state meanwhile had decided such bonds to be unconstitutional, and it is stipulated that these bonds were considered to be valueless. Under those circumstances, the transaction whereby the bonds were surren-

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dered was valid. There can be no doubt about that. It is a misconception to suppose that the supreme court of the United States hold that the railroad subscription, as a subscription, is valid, contrary to adjudication of the state supreme court. All it holds is that commercial securities in the hands of *bona fide* holders must be protected. Hence the argument here made by Mr. Howell, that the surrender of the stock was a fraud upon the company's creditors, has no application. The city's liability as a stockholder could not be enforced. That is not a commercial security. Here is the decision of the supreme court of the state that the city had no right to become a stockholder, and the obligation of a stockholder cannot be enforced against it. So I say, it is clear that the surrender of these bonds was effectual and binding upon the city and the railroad company.

The result is, that upon all these grounds Mr. Foote, as it appears to us, has no case.

Judgment for defendant.

DONAHUE and others v. ROBERTS and others.

(*Eastern District of Missouri.* March, 1880.)

1. ACCOUNT — JOINDER OF ADMINISTRATOR AND SURETIES IN THE SAME SUIT — PAYNE v. HOOK, 7 WALL. 425; 14 WALL. 252, FOLLOWED. — An administrator and his sureties may be joined in a suit against the administrator for an account and settlement, and for judgment against the sureties for the balance found due upon the settlement of such account.
2. ADMINISTRATOR — SURETIES — FRAUDULENT AND COLLUSIVE CLAIM. — It cannot be determined upon demurrer whether such sureties are liable for the alleged fraud and collusion of the administrator in the proof and allowance of his own individual claim against the estate of his intestate.

In equity. Demurrer to complaint.

Lucien Eaton, for complainants.

Louis Houck, for respondents.

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McCRAEY, *Circuit Judge (orally)*.—This case was submitted upon a demurrer to the complainants' bill. The bill is brought by the heirs of Mrs. Roberts, against her administrator and his sureties, charging fraud in the settlement of the accounts of the estate, and seeking to have an adjustment of the amount due from the administrator, and to recover the same as against him and his sureties. The demurrer raises the question whether the two can be joined in one action—that is, a suit against the administrator to settle his accounts and to recover the balance, and at the same time against his sureties to obtain judgment against them for whatever balance may be ascertained. That question has been fully settled by a case which went up from this court and was twice considered by the supreme court of the United States. *Payne v. Hook*, 7 Wall. 425; 14 Wall. 252, where the same question was fully considered, and the right to join the administrator and his sureties in such a suit for these purposes was fully sustained. A further question is made, which is this: The administrator of this estate presented a claim in his own behalf, and, for the purposes of the settlement of that claim, a temporary administrator was appointed, called under the statute, I believe, an attorney to represent the heirs. There was a hearing upon that matter, and the claim was allowed. It is now insisted that the sureties of the administrator are not responsible for any fraud committed in that transaction. The bill, however, charges collusion and fraud on the part of the administrator in connection with this transaction, and it will depend, I think, altogether on the proof as to whether he is liable in his official capacity; and if liable, of course his sureties are liable. That matter can be determined only after the proofs are submitted.

The demurrer to the bill is overruled.

Jeffries, Adm'r, v. Union Mut. Life Ins. Co.

JEFFRIES, Adm'r, v. UNION MUT. LIFE INS. CO.

(Eastern District of Missouri. January, 1880.)

1. LIFE INSURANCE—WARRANTY—AVERMENT OF APPLICANT THAT HE IS A SINGLE MAN.—The averment of a married man, in an application for life insurance, that he is a single man, amounts to an absolute warranty.
2. ATTORNEY AT LAW—COMPROMISE OF SUIT—EXPRESS AUTHORITY—SATISFACTION OF JUDGMENT.—The entry of the satisfaction of judgment on the record of the court will not be set aside, where such satisfaction was entered pending a writ of error to the supreme court in behalf of the defendant, upon part payment of the judgment, under a compromise with the duly authorized attorneys of the plaintiff, although such entry of satisfaction was not made in open court, and the original plaintiff had died pending such compromise, and the authority of the attorneys had not been ratified by the administrator *de bonis non*.

Motion to set aside entry of satisfaction of judgment.

Waldo P. Johnson and John Flournoy, for plaintiff.

John R. Shepley, for defendant.

TREAT, *District Judge (orally)*.—I have had under consideration a matter concerning which there are a great many incidents. I am not disposed to go into those matters at any considerable length. A suit was brought in this court, by an administrator named Jeffries, on a life insurance policy. The case went from this court to the supreme court of the United States, and the supreme court reversed this court on this proposition, viz.: on the averment made in the application by the insured that he was a single man and not a married man.

This court held, in the light of the authorities as they were then supposed to exist, that that question should not be held an absolute warranty, but, connected with the facts, to be submitted to the jury, whether it was a matter material to the case. The supreme court held the sharp doctrine that it was a warranty, and if he represented himself as single and was married, there could be no recovery. The case came back for trial, and evidence was produced to show that the representa-

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tion of the plaintiff was written down as an answer by the agent of the underwriter, he, the agent, supposing that to be the man's condition, without relying upon his statement or paying any attention to it. The matter came up for trial and the jury found for plaintiff, and the court set aside the verdict, as it did not think the testimony sufficient to establish the fact. A second trial was had — a fuller trial — and a verdict was again rendered for the plaintiff, and the case was taken by the insurance company to the supreme court of the United States. In the ordinary course of decisions there, this case would not have been reached, possibly, for some years. The counsel for the insured then, after correspondence with the insurance company, agreed to take what was about two-thirds of the amount of the judgment, in round numbers. The proposition being accepted, thereupon counsel did receive the sum of money pursuant to the compromise, to wit, the two-thirds, and entered satisfaction of the judgment.

The question presented to the court is upon a motion to set aside that entry of satisfaction, first, because a counsel employed to prosecute a case has no right to compromise it. Such is the view of the supreme court of the state of Missouri; but the rulings are largely in conflict. But this case has another aspect: the original plaintiff entered into a specific contract — which I certainly do not think commendable — whereby these attorneys (two in number) should prosecute this extremely doubtful claim; they to receive a certain portion of the proceeds, with full power to compromise as they should please. And they prosecuted under these doubtful circumstances, and finally compromised, and, having compromised, the defendant company has paid this money. It is contended that the attorneys thus compromising did an act which is void in itself, and that without the money paid being returned, to wit, about \$9,000, the compromise may be declared void, and execution be issued for the whole amount of the judgment.

I am not disposed to go into an examination of the author-

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ities, but merely state, for the purposes of the determination of this motion, that here *express authority* was given with regard to the matter; that this claim was very doubtful, and that in my judgment the compromise was rightly made. I heard the case three times, and in my opinion plaintiff would not have received a sixpence before the supreme court. I think that the attorney acted, so far as money considerations are concerned, very wisely. Should this entry be now set aside? On what ground? That the entry was made during a term of court on the record instead of in open court? It so happens that there is no express statute of the United States as to entering satisfaction; but it is claimed that by analogy we might follow the state statute, and if we follow that practice, this entering of satisfaction may be made in open court or in vacation, on the margin of the record. But if, on the facts stated, this entry is found to be void, the court would permit the party to appear in open court at this moment, merely to cure a technical error.

Now, the difficulty arises on the face of the contract. Under the old common law such a contract would not have been permitted. I think it would be better if the old common law was retained with regard to it; but such is not the law, unfortunately. Parties, at their own expense, may pursue a doubtful demand, and, when the result is accomplished, the contract is upheld. But it is said again, that the original plaintiff died pending the proceedings, and a revivorship was had in the name of the administrator *de bonis non*; that this new plaintiff did not enter into any contract or ratify the old one; and that, therefore, the power given to the attorney to compromise could not be considered as applicable to matters as they stood on final hearing. When a contract is made by a party, he who succeeds in interest to him is bound by the original contract.

But this motion is against a defendant that has paid between \$9,000 and \$10,000, to declare all the proceedings had under the circumstances void, and hold that company liable

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to execution for the whole amount of the original judgment; a part of the agreement to compromise being that the defendant insurance company should dismiss its writ of error in the supreme court of the United States, which it has done. How can you put this company into its original position? It must lose this amount of money; is out of the supreme court, and is remediless by the fault of the original plaintiff, and the contract which he chose to enter into. Such would be neither justice nor right, without going into the extreme proposition as to whether an attorney employed in the case has a right to compromise it. In this case there was a specific contract, and I overrule the motion.

CUNNINGHAM v. COUNTY OF RALLS.

(Eastern District of Missouri. March, 1880.)

JURISDICTION — ACTION AGAINST COUNTY — REV. ST. OF MISSOURI, § 5359. — Section 5359 of the Revised Statutes of the state of Missouri, which provides that "all actions whasotever, against any county, shall be commenced in the circuit court of such county," etc., does not deprive the federal courts of jurisdiction in an action against a county of such state brought by a citizen of another state.

Demurrer to plea to the jurisdiction.

Overall & Judson, for plaintiff.

Henry A. Cunningham, for defendant.

McCARY, *Circuit Judge (orally)*. — This is a suit on bonds issued by the county of Ralls on the tenth day of February, 1870. Plaintiff is a citizen of the state of Indiana, and brings suit upon the bonds in this court. There is a plea to the jurisdiction. No question is made as to the citizenship of the parties, nor is it claimed that there is anything to bar the jurisdiction of this court except a recent statute of the state of Missouri, which is found in section 5359 of the Revised Stat-

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utes of Missouri of 1879, as follows: "All actions whatsoever, against any county, shall be commenced in the circuit court of such county, and prosecuted to final judgment and execution therein, unless removed by change of venue to some other county, in which case the action or actions so removed shall be prosecuted to final judgment and execution in the circuit court of such other county."

This is an amendment to a previous statute, which read as follows: "All actions, local or transitory, against any county, may be commenced and prosecuted to final judgment in the circuit court of the county against which the action is brought." 1 Wagner St. 408, § 4.

In a case against Lincoln county, brought before this court some time ago, there was a plea to the jurisdiction, under the original statute above quoted, which was overruled (7 Cent. Law J. 264), Judge DILLON expressing the decided opinion that the statute did not take the case out of the jurisdiction of this court. He further said that if the statute was intended to have this effect it would, under the ruling in the case of *Insurance Co. v. Morse*, 20 Wall. 445, be unconstitutional; and he added: "We cannot assent to the conclusion that it is within the power of the state to create political bodies capable of contracting debts with citizens of other states, and yet privileged against being compelled to pay those obligations by suit in the national courts."

It will be seen that no stress was placed upon the fact that the language of that act was permissive, using the word "may" instead of "shall," but the ruling was put upon the ground that the jurisdiction of the federal courts cannot be interfered with by state legislation. The recent statute, if construed as regulating proceedings in the state courts, is, of course, entirely valid, and so far as I can see it is altogether proper. But it is perfectly clear, both upon reason and authority, that it cannot be invoked for the purpose of curtailing or abridging the jurisdiction of the courts of the United States.

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If we concede that the state, by legislation, can deprive the federal courts of jurisdiction in one case by declaring that certain parties shall not be permitted to sue or be sued in the federal courts, it would follow, of course, that the state might by their legislation deprive the federal courts of all jurisdiction. For, if the state can, by its own act, provide that one citizen shall not sue or be sued in a federal court, in a case coming within the constitution and laws of the United States, it may, in like manner, exclude all its citizens from the federal courts.

In the case referred to by Judge DILLON, which was the insurance company against Morse, *supra*, the supreme court of the United States said: "The constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and to the treaties made or which shall be made under their authority; * * * to controversies between a state and citizens of another state, and between citizens of different states.

"The jurisdiction of the federal courts, under this clause of the constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by congress in pursuance of the constitution. This has been held many times." *Railway Co. v. Whitton*, 13 Wall. 270-286, and other cases.

It is therefore clear, both upon reason and upon authority, that we must sustain the demurrer to the plea to the jurisdiction in this case, and it is so ordered.

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RUTHERFORD v. THE PENN. MUT. LIFE INS. CO.

(Eastern District of Missouri. March, 1880.)

PRACTICE — SUPERSEDEAS — MOTION FOR A NEW TRIAL — SECTION 1007, REV. ST., CONSTRUED.— A writ of error will operate as a *supersedeas*, under section 1007 of the Rev. St., if duly served "within sixty days, Sundays exclusive," after a motion for a new trial has been overruled.

A. R. Taylor, for plaintiff.

W. H. Clopton, for defendant.

MCCRARY, *Circuit Judge (orally)*.— This case presents a question of practice of some importance, in its application to this case as well as others; but it is one upon which I have no difficulty. The question is, whether the defendant here has lost its right to a *supersedeas* on account of the delay which has occurred since the trial of the case.

The statute (Rev. St. § 1007) provides that "in any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. * * *

 And the question arises upon the meaning of the words "within sixty days, Sundays exclusive, after the rendering of the judgment complained of."

I apprehend that the statute ought to be construed so as to commence to run at the time of the final judgment. There was a motion made for a new trial in this case, and an order of the court was made suspending the execution until the determination of that motion. The motion for a new trial was made in pursuance of the right which is given by the statute in section 726. I have no doubt of the right of any party to have a motion for a new trial heard under this section: "All of the said courts shall have power to grant new trials, in

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cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." It often happens that in the hurry of a trial questions arise which the court is obliged to pass upon without that consideration which is desirable; and the policy of the law is always to provide ample means for a review or reconsideration of the questions which may arise, and to reserve to the court a right, upon a reconsideration, to set aside the judgment or modify it, if the ends of justice and the law seem to require it. Therefore, I think that, under section 726, the party had a right to make his motion for a new trial.

But there is another section that has been called to my attention—section 987 of the Revised Statutes. This section still further provides for motions of this character, and it applies to a case where a party is not prepared at the time of trial to immediately file his motion. It provides for giving time within which that may be done. It says: "When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such considerations for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial." * * * And then follows a provision, that "if such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse, at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."

Now this is not the only section under which the party can apply for a new trial. His right to apply is independent of this section. This provides for a case where he desires to obtain from the court an extension of the usual time within which to make his application; and in that case, where he

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gets such time merely to apply, he must show that he has presented his petition, and that it has been allowed in accordance with the provisions of the section; but if he makes his motion for a new trial without asking for the time, then he can make it independently of section 987, and is not bound by the provisions of that section. In other words, the court had a perfect right to entertain the motion for a new trial; it did entertain it, and suspended the execution until it should be determined.

Now the judgment cannot be said to have been finally rendered until the determination of the motion for a new trial in this case. That is very clear, when it is considered that the motion might have been sustained as well as overruled, and in that case the effect of the action of the court would have been the same as if there had been no judgment, or it had been the other way. And, if the rule contended for by the plaintiff should be sustained, it might result that there would be a case pending in the supreme court on appeal from a judgment which was never rendered, in point of fact, in this court. The construction of section 987 will illustrate what I have said upon this point. Under that section, where a party applies for time to file his application for a new trial, the motion, as you will perceive, may be granted at the next term; and the execution shall, of course, be further stayed until the next session of the court, if the party is allowed to file his petition. Now, suppose in the meantime he has taken his writ of error and gone to the supreme court, and has obtained, perhaps, a hearing and decision in the supreme court, and after all that a motion for new trial comes up in the court below and is sustained.

It would be an anomaly to provide for an appeal or writ of error from a suspended or inoperative judgment. I think it a fair, although it is a liberal construction of the statute, to say that the time begins to run from the day when the motion for a new trial is overruled; and that is the construction I give it in a case where the application has been made in time, and

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execution suspended. Of course, if I am wrong, a motion to set aside the *supersedeas* can be made in the supreme court, I apprehend, and the question there can be finally determined.

You may present your bond, and the court will pass upon the sufficiency of the sureties.

Citing—*Silsby v. Foote*, 20 How. 290; *Brockett v. Brockett*, 2 How. 238; *Green v. Van Buskirk*, 5 Wall. 307; *Telegraph Co. v. Eyser*, 19 Wall. 419; *Sage v. Central Railroad*, 93 U. S. 412-417; *Kitchen v. Randolph*, 93 U. S. 86; *Cambuston v. United States*, 95 U. S. 285.

EHRMAN v. TEUTONIA INS. CO.

(*Eastern District of Arkansas. —, 1880.*)

1. PLEADING—WANT OF JURISDICTION—OBJECTION TAKEN BY ANSWER. The Arkansas code abolishes pleas in abatement, and in that state there is no difference in the method of pleading matter in abatement and matter in bar; and where a want of jurisdiction over the person is not disclosed upon the face of the complaint the objection may be taken by answer.
2. SAME—MATTER IN ABATEMENT—HOW PLEADED.—Matter in abatement must be pleaded with exactness, and ought to be certain to every intent.
3. INSURANCE COMPANIES—NON-COMPLIANCE WITH STATUTE OF STATE—VALIDITY OF POLICIES.—By failing to comply with the requirements of the Arkansas statute, prescribing the terms upon which insurance companies of other states may do business in that state, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holder.
4. SAME—SUIT ON POLICY—PROCESS—SERVICE ON STATE AUDITOR—ESTOPPEL.—A statute of Arkansas provides that no insurance company, not of that state, shall do business in the state until it has filed with the auditor a stipulation in writing agreeing that legal process affecting the company, served on the auditor of state, shall have the same effect as if served personally on the company. *Held*, that if an insurance company does business in the state, and issues policies to citizens of the state on

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property within the state, that in a suit on such a policy, service of process on the auditor was good personal service on the company, although the written stipulation to that effect was not filed with the auditor; that in such case the company was estopped to say that it had not filed the stipulation, and had not assented to such service.

This action was brought to recover for an alleged loss on a fire policy. The complaint alleged the plaintiff was a citizen of the state of Arkansas, and that the defendant was a corporation created by the laws of the state of Louisiana and a citizen of that state "doing business and taking risks of insurance in the state of Arkansas," and that plaintiff paid the premium and the defendant issued to him the policy in suit. The property insured was then contained and during the life of the policy was to be kept in a building situated in the city of Helena, Arkansas, and that the loss occurred there. Summons was issued and duly served on the auditor of state, under section 3561 of Gantt's Digest, as amended by act of February 27, 1875.

The defendant entered a special appearance, and filed the following plea, not sworn to: "Now, on this day, comes the defendant, the Teutonic Insurance Company, and, without entering their appearance herein, say, by way of abatement of the writ in this behalf, that they never had any agent in this state; they never had any certificate of authority, as provided for by the act of February 27, 1875; that they never, in any manner, complied with the laws of the state of Arkansas providing for the duties and liabilities of foreign insurance companies doing business in this state, known as the act of February 27, 1875; that service of process upon the auditor of the state of Arkansas is no service upon them, and that they are not bound by the same. Wherefore, they pray judgment, and that said writ be abated."

Plaintiff demurred to the plea.

Tappan & Horner, for plaintiff.

Palmer & Nichols, for defendant.

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CALDWELL, *District Judge*. — Under the code of this state there is no difference in the method of pleading matter in abatement and matter in bar. Pleas in abatement are abolished, and where a want of jurisdiction over the person or subject of the action is not disclosed upon the face of the complaint the objection may be taken by answer. Gantt's Digest, § 4567; Pomeroy on Remedies, §§ 697, 698, 721; Bliss' Pleadings, § 345. Where other defenses are embraced in the answer the court will put the issues to the jury in such a way as to elicit their verdict on the matter in abatement specifically, and where the finding on that issue makes it necessary to do so, will see that the proper judgment in abatement is rendered. *Id.*

That the paper filed is not technically in the form of an answer, under the code, and is not verified, are not objections that the court will notice on demurrer. But the rule of pleadings remains, that matter in abatement must be pleaded with exactness, and ought to be certain to every intent. Under this rule none of the allegations of the answer are good. It may be true that the company never had any agent in this state, and yet the contract may have been made in this state by the president or other officer of the company, or by a broker, acting for the company; and the second allegation is disposed of by the observation that the act of February 27, 1875, upon which the pleader in terms rests his plea, is not the act under which the company is required to do these things.

The averments in the plea may all be true, and yet the company may have complied with all the requirements of the act of April 25, 1873 (sections 3540-3565, Gantt's Digest), which is the act prescribing the duties of foreign insurance companies doing business in this state. The act of 1875 simply devolves on the auditor of state the duties imposed by the act of 1873 on the insurance commissioner. And the allegation that service on the auditor is not service on the company is bad, because it does not show why it is not good service.

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Service on the auditor may be good personal service on foreign companies doing business in this state, and the plea does not deny the existence of facts that would make such service good on this company.

It does not deny that the company transacted business and issued the policy in suit in this state. But, waiving the technical objections to the plea capable of amendment, we come to the important point intended to be raised by the pleader, viz.: Whether, on the admitted facts on the record, service on the auditor of state is good service on the company.

Every material allegation in the complaint not denied by the answer is admitted.

As the record stands the defendant admits that the plaintiff is a citizen of this state; that the defendant is an insurance company of another state, doing business and taking risks of insurance in this state; that the plaintiff paid the premium, and the defendant issued to him the policy in suit; that the property insured was in this state, and was, by the terms of the policy, to be kept here during the life of the policy, and that the loss occurred in this state. In the face of these admissions can the company be heard to say that service of the summons on the auditor is not good personal service on the company?

The insurance act of this state declares it shall be "unlawful" for insurance companies to do business in this state without complying with its provisions (section 3555), and the act, among other things, requires them to make certain reports to the auditor of state disclosing their financial condition; and foreign companies are required to pay into the state treasury three per cent. of the amount of their premiums received for policies issued in this state, and such companies, their agents or brokers, transacting or soliciting business without having received authority agreeably to the provisions of the act, are subject to a penalty "of \$500 for each month or fraction thereof during which such illegal business is transacted." Section 3562.

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The objects sought to be attained by this act are security and protection to policy holders, and revenue to the state, but chiefly the former. By failing to comply with the requirements of the act the companies, and their agents and brokers, render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holders. *Union Mutual Ins. Co. v. McMillen*, 24 Ohio St. 67; *Clay Fire Ins. Co. v. Huron Salt Co.* 31 Mich. 346; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Lamb v. Bowser*, 7 Bissell, 315; S. C. id. 372; *Hartford Live Stock Ins. Co. v. Mathews*, 102 Mass. 221.

The leading provision for the protection of the policy holder is contained in section 3561. This section is a literal copy of the Pennsylvania statute. See *Ex parte Schollenberger*, 96 U. S. 369-374, where it is set forth at length in the opinion of the court. So much of it as is material to this case reads as follows: "No insurance company, not of this state, nor its agents, shall do business in this state until it has filed with the auditor of state of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor of state, or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state."

The supreme court of the United States, speaking of a similar provision in a statute of Ohio, say: "We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the state of Ohio should endeavor to secure its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that state and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the state for their benefit and

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profit, to answer there for the breach of their contracts of insurance there made and to be performed." *Lafayette Ins. Co. v. French et al.* 18 How. 404.

And in a later case, the court say that if there could be no legal redress short of the seat of the company in another state, the cost of the remedy would in most instances exceed the value of its fruits, and the result would be, to a large extent, immunity from all legal responsibility. *Railroad Co. v. Harris*, 12 Wall. 65.

By the provisions of section 3561 every insurance company of another state is required to stipulate in terms that service on the auditor shall be service on the company. If the stipulation is filed service may be on the auditor, or the person designated by him, or the agent designated by the company, at the election of the plaintiff. *Cunningham v. Southern Express Co.* 67 N. C. 425. And if the auditor does not designate a party, and the company does not specify an agent, then the auditor alone is the proper person to serve with the process, and such service binds the company.

The citizen insuring his property in this state is not required to search the files of the auditor's office for the purpose of ascertaining whether the company has filed the required stipulation, and otherwise complied with the statute. The receipt of the premium and the execution and delivery of the policy by the company, are equivalent to an assertion by the company that it has complied with the requirements of the statute to entitle it to do business in the state, and, as between the assured and the company, the latter is estopped, upon the soundest principles of the law and morals, to say that it has not done so.

That the stipulation was not, in fact, filed with the auditor, is of no consequence if the company has done those things which imposed upon it the obligation and duty to file it.

The law deduces the agreement on the part of the company to answer in the courts of this state, on service made upon the auditor, from the fact of its doing business in the state; and

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the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive, and no averment or evidence to the contrary is admissible to defeat the jurisdiction. The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizen dealing with the company, and when, by its own act, its obligation to file the stipulation is perfect, as between the company and the citizen, the company will not be permitted to relieve itself from a liability which the written stipulation would have imposed by pleading its own fraud on the law of the state and her citizens. In such cases the law conclusively presumes that to have been done which law and duty and the rights of the party contracting with the company required to be done. It is a familiar principle that jurisdiction cannot be acquired by fraud, nor can it be evaded by such a fraud as is here attempted to be set up.

The maxim that no man shall take advantage of his own wrong is as applicable to corporations as to natural persons, and applies as well to the kind of agreement under consideration as to any other.

Insurance companies incorporated by the laws of one state have no absolute right to do business in another state, without the consent, express or implied, of the latter state.

This consent may be given on such terms as the state may think fit to impose, and these conditions are binding on the company, and effect will be given to them in the courts of all the states and the United States. *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168.

"One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented and will be bound accordingly." *Railroad Co. v. Harris*, 12 Wall. 65.

The principle established in the case last cited has been affirmed in later cases. *Railway Co. v. Whitton*, 13 Wall. 270, 285; *Ex parte Schollenberger*, 96 U. S. 369; and see *Hayden v. Androscoogin Mills*, 9 Rep. 270; *Albright v.*

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Empire Pr. Co. 18 Albany L. J. 313; S. C. 6 Rep. 673;
Wilson Packing Co. v. Hunter, 7 Rep. 455.

Upon the admitted facts of this case, service upon the auditor was good personal service on the company, and it must appear, or suffer a judgment by default.

Demurrer sustained.

HOYT, MILLER *et al.* v. WRIGHT.

(*District of Colorado.* October, 1880.)

PRACTICE—REMOVAL OF CAUSE FROM THE STATE COURT, AND REMANDING SAME.—Causes removed from state court may be remanded, on motion, when the record shows a want of jurisdiction in the federal court. If, upon the face of the record, the federal court has jurisdiction, objection to trial here can be raised only by formal plea to the jurisdiction. That a plaintiff conveyed his interest in the property in controversy to one of his associate plaintiffs, "for the purpose of conferring jurisdiction on" the federal court, no ground for remanding case, provided the sale was in fact made. Otherwise, if the transfer be without consideration, and the party pretending to convey still is the owner of the property. That would be collusive proceeding, and ground for remanding cause to the state court. But this is a question of fact which must be raised by plea.

The defendant filed a petition, in which he alleged that one J. M. Mills, with the present plaintiff, brought this suit; that while the suit was pending in the state court, Mills conveyed his interest in the property in controversy to his co-plaintiff, Wright, and then caused the suit to be dismissed as to himself; that Mills was then, and still is, a citizen of Colorado, and that such sale and transfer, and the dismissal of the suit as to himself, was made for the avowed purpose of giving this court jurisdiction. The plaintiffs proposed to file affidavits in answer to this petition, upon which the court remarked as follows:

HALLETT, *District Judge.*—In cases removed from a court of the state, if there is in the record, either in the state court

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or in the petition for removal, anything showing want of jurisdiction in this court, the party objecting to the removal may rely upon that by motion to have the cause remanded. If, taking the facts appearing in the record and petition to be true, this court has jurisdiction, the party objecting to the jurisdiction must make his objection by plea to the jurisdiction; that is, he must allege the facts in a manner in which issue may be joined, and according to the course and practice of the court, so that they may be properly determined; and it has been determined by the supreme court that the method of doing that is by plea to the jurisdiction, and in that way only. Upon such a plea we know what course is to be pursued; we know how to consider it, how to ascertain its sufficiency, and how, if issue be joined upon it, to reach a conclusion as to the matter of fact.

This paper is called a petition to remand, and in it the pleader sets up a matter which is not shown in the record, and as a pleading it is something that we know nothing about, and we could not take any notice of it, if the matters alleged in it were such as would be sufficient to remand the cause, if true; but the matter stated in the petition is not in itself a ground for remanding the case. It is alleged that Mr. Mills was a party to this suit in the state court, and an owner in the property in controversy; that he conveyed his interest in the property to one of his associates, one of the plaintiffs, and thereupon moved on behalf of the other plaintiffs to transfer the cause to this court; that this was done for the purpose of conferring jurisdiction upon this court; "that the sale and conveyance by Mr. Mills to his co-plaintiff, Wright, and the discontinuance of the action as to himself in the district court of the county of Ouray, and state of Colorado, was made for the sole and avowed purpose of giving this court jurisdiction of said case." If that is true exactly as stated, it is no ground for remanding the case, provided the sale was in fact made. A party having property may sell it for the express purpose of enabling his vendee to sue in this court, and if it be a real

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sale and not a sham, that is no objection to the jurisdiction. But if the transfer is merely colorable—if, notwithstanding the transfer, he still retains his interest in the property, and is still the owner of it, then it would be a collusive proceeding, which, of course, would not confer jurisdiction. The question in such a transaction as this is, whether there was a real transfer of the interest by which the vendee in the conveyance obtained a title, or whether it was colorable merely; whether Mr. Mills still retains his interest in it. If by plea to the jurisdiction in the form which is prescribed by law, the defendant here is able to allege that Mr. Mills, being a party to this suit in the state court without consideration, or in any way which was not effective to transfer his interest, and merely for the purpose of giving this court jurisdiction, transferred his interest to one of the other parties, and thereupon caused the suit to be removed, that may be ground for remanding; otherwise we must retain the case here. I do not see that any order is to be made here; we take no notice whatever of the petition.

BROOKS *et al.* v. FARWELL *et al.*

(District of Colorado. October, 1880.)

1. PRACTICE—UNITED STATES CIRCUIT COURT WILL NOT REVIEW RULING OF STATE COURT.—In cause removed from the state to the federal court, the proceedings in the former will not be reviewed by the latter. The remedy to correct supposed error in such case is by appeal to the supreme court of the United States.
2. NON-RESIDENT DEFENDANT—MOTION TO QUASH SUMMONS ON—PLEA IN ABATEMENT, etc.—The state court having overruled motion to quash service of summons on a non-resident defendant, and ruled that the proper method of raising the question is by answer in the nature of a plea in abatement, and such answer having been there filed, the ruling will not be reviewed in this court.
3. ONE BROUGHT INTO A STATE UNDER PROCESS OF A COURT to attend upon the trial of a cause, is exempt from process in such state, while necessarily attending there in respect to such trial.

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HALLETT, *District Judge*. — Brooks and the Purdy Silver Mining Company brought suit in the district court of Arapahoe county against John V. Farwell and another, in March last. Farwell appeared and filed a motion to quash the summons, or service of the summons, alleging in an affidavit accompanying the motion that he had been in attendance upon court in another suit brought by one of the plaintiffs, and that he was a resident and citizen of the state of Illinois, and had come here necessarily for that purpose, and so was exempt from service while in attendance on the court. Upon hearing that motion, the court denied it, but gave leave to the defendant to set up the same facts in an answer in the nature, it is said, of a plea in abatement. Thereafter the cause was removed into this court, and the plaintiff now asks for judgment — claiming that the answer cannot be received; that it is not according to the course of pleading under the code; that any answer that may be filed must go to the complaint, and that nothing can be averred against the summons, or service of the summons, by way of answer. As to that question, it must be assumed that that was passed upon in the district court of Arapahoe county, in overruling the motion to quash the service of the summons. In allowing the defendant to file an answer setting up the same matters, the court must have held that that was the proper practice — the proper course of procedure. That being decided there, cannot be reviewed or in any manner set aside in this court. We do not, on the removal of a cause from a court of the state, review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court. As to all questions that are passed upon in the state court before the removal of the cause, they are fully and finally determined, so far as this court is concerned, and can only be reviewed in the supreme court of the United States, if there be error in them; so that this plea is to be received as well pleaded here, and as to the matter of the plea, there can be no doubt as to its sufficiency. The authorities are clear to the point that a

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party going into another state as a witness, or as a party under process of a court to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial. Having been brought into such foreign state by process of law, he cannot, while there, be called to answer in another action. *Parker v. Hotchkiss*, Wallace, Jr. 269; *The Junean Bank v. McSpedan*, 5 Bissell, 64.

The motion will be denied.

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(*Eastern District of Arkansas. ———, 1880.*)

PARTNERSHIP — SOLE SURVIVING PARTNER — PLEDGE OF PERSONAL PROPERTY FOR PARTNERSHIP DEBT. — A sole surviving partner may transfer the choses in action and other personal effects of the partnership, by way of pledge or mortgage, to secure a partnership debt, and when such transfer is made in good faith it is effectual against all the other creditors, as well as the representatives of the deceased partner.

Burnett & Turner were partners in the business of keeping a wharf-boat at Helena. The firm owned a wharf-boat, which was purchased and used for partnership purposes, and was partnership property. This wharf-boat was purchased from Johnson, partially or wholly upon credit. Burnett, one of the partners, died before the wharf-boat was paid for, and after his death, and on the twenty-fifth day of April, 1879, Turner, as surviving member of the firm of Burnett & Turner, transferred the wharf-boat, by deed of trust in the nature of a mortgage, to Tappan, to secure the payment to Johnson of the balance of the purchase money. The deed of trust was duly acknowledged and recorded on the twenty-fifth of April, 1879.

On the twelfth of March, 1879, Bohler, Huse & Co. recovered a judgment against Burnett & Turner, in the United

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States district court, at Helena, for \$1,399.78, and costs. On the twenty-sixth day of April execution was issued on this judgment, and on the thirtieth day of the same month the writ came to the hands of the marshal, and was levied on this same wharf-boat. By agreement the boat was sold, and the proceeds paid into the registry until it should be determined whether the plaintiffs in the execution, or the beneficiary under the deed of trust, was entitled thereto.

Thweatt & Quarles, for plaintiffs.

Tappan & Horner, for defendant.

CALDWELL, *District Judge*. — The precise question in this case, on the agreed facts, is whether a sole surviving partner can make a valid transfer by deed of trust in the nature of a mortgage of personal property, belonging to the partnership, to secure the payment of a partnership debt.

During the continuance of a partnership, one partner may transfer personal property by way of mortgage as security for a partnership debt. *Milton v. Mosher*, 7 Met. 244; *Patch v. Wheatland*, 8 Allen, 102; *Anderson v. Tompkins*, 1 Brock. (Marshall's Decs.) 456; *Harrison v. Sterry*, 5 Cranch, 289.

On the dissolution of partnership by the death of one copartner, the right to the possession and control of the partnership effects vests in the survivor, for the purpose of settling up the partnership affairs. He has the legal title to the assets, and the exclusive right of disposing of the property, and of collecting and paying the partnership debts. *Stearns v. Houghton*, 38 Vt. 583; *Roys v. Vilas*, 18 Wis. 179; *Pinckney v. Wallace*, 1 Abb. Pr. 82; *Berry v. Briggs*, 22 Mich. 201.

And the right and power of the sole surviving partner to dispose of the partnership effects, in settlement of the partnership business, is not limited to the right to make an absolute sale of the same, but he may transfer the choses in action and other personal property, by way of pledge or mort-

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gage, to secure a partnership debt; and, when such transfer is made in good faith, it is effectual against all other creditors, as well as the representatives of the deceased partner. *Loeschek v. Addison*, 4 Abb. Pr. (N. S.) 210; *Hitchcock v. St. John*, 1 Hoff. Ch. 511; *Wilson v. Soper*, 13 B. Mon. 411.

No fraud is charged or proven. The case turns on the question of the power of a sole surviving partner, acting in good faith, to secure a partnership debt by giving a mortgage or other lien on personal property. His right to do so is not open to serious question.

The lien of the deed of trust is prior in point of time, and therefore paramount to the lien of the execution; and the money arising from the sale of the wharf-boat must be paid to the beneficiary under the deed of trust.

 KIMBERLING v. HARTLY and another.

(*Eastern District of Arkansas. —, 1880.*)

1. **EQUITABLE LIEN — FRAUDULENT CONVEYANCE BY JUDGMENT DEBTOR — BILL FILED BY JUDGMENT CREDITOR.** — Judgment, execution and a return of *nulla bona* place the judgment creditor in a position to assail conveyances made by the judgment debtor to defraud his creditors, and the filing of a bill for that purpose, and the service of process in the action, create a lien in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors.
2. **SAME — BANKRUPTCY.** — The lien thus created is not displaced by the subsequent bankruptcy of the judgment debtor, but is protected by the bankrupt act.
3. **ASSIGNEE IN BANKRUPTCY — SELECTION OF BANKRUPT'S PROPERTY.** — Assignees in bankruptcy are not bound to take all the property of the bankrupt, but may reject such as may be rather a burden than a benefit to the estate.
4. **BANKRUPTCY — JURISDICTION OF STATE COURT IN SUIT PENDING.** — Where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause and execute the same. The assignee in bank-

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ruptcy may intervene in such action, but the jurisdiction of the state court and the validity of its decree is not affected by his failure to do so.

5. **ASSIGNEE IN BANKRUPTCY—ASSIGNMENT PENDENTE LITE—SUBSEQUENT PROCEEDINGS.**—The rule that one who purchases *pendente lite* is bound by the subsequent proceedings, is applicable to an assignee in bankruptcy, and to the transfer made by a bankruptcy proceeding.

On the eighth day of February, 1875, the defendant John Hartly recovered judgment in the circuit court of White county, Arkansas, against Thomas J. Oliphant, for the sum of \$280.27, upon which judgment execution was issued and returned *nulla bona*. November 22, 1875, the judgment creditor, Hartly, filed his bill on the equity side of the White county circuit court, alleging the above facts, and further alleging that the judgment defendant, Oliphant, was the owner in fee of the real estate in controversy in this case, and that some time prior to the rendition of the judgment in favor of Hartly he conveyed the same to his wife, Georgia Oliphant, with the limitation in substance that the land was to revert to him if his wife should die without children. The bill alleged this conveyance to his wife was voluntary, and made to hinder, delay and defraud his creditors, both existing and subsequent, and prayed that the property might be decreed to be sold to satisfy the plaintiff's judgment. Oliphant and his wife were made defendants to the bill. Oliphant was served with process the day the bill was filed, and afterwards appeared to the action.

In June, 1876, Oliphant was, on his own petition, adjudged a bankrupt by the district court of the United States for the eastern district of Arkansas. He did not schedule the property in question as part of his assets. Georgia Oliphant, the wife, died in July, 1876, and the action abated as to her, and the plaintiff and defendants in this action concede that, under the limitation in the deed, the legal title to the land reverted to Oliphant at her death. Oliphant's assignee in bankruptcy never asserted any claim to the property nor sought to become a party to the suit, and was not made a party, and was dis-

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charged by the bankrupt court before final decree in the case. Hartly never proved his judgment as a debt against the estate of the bankrupt. Oliphant never answered the bill, but before final decree filed his certificate of discharge in bankruptcy in the case, and moved to dismiss the cause for want of jurisdiction, and because his assignee in bankruptcy was not made a defendant.

On the twenty-seventh of January, 1877, a final decree was rendered in the cause, in accordance with the prayer of the bill. From this decree, Oliphant appealed to the supreme court of the state, where the decree below was affirmed. *Oliphant v. Hartly*, 32 Ark. 465.

The property was sold under the decree, and purchased by Hartly, the plaintiff in that action, and one of the defendants in the present suit. Afterwards Oliphant, the bankrupt, conveyed the property to the present plaintiff, who brought this action of ejectment to recover the property from the purchaser at the sale made under the decree of the state court. To the answer, which by agreement is to be taken as setting up with the requisite fullness and particularity the above facts in bar, the plaintiff filed a demurrer.

T. J. Oliphant, for plaintiff.

B. D. Turner, for defendant.

CALDWELL, *District Judge*.—The plaintiff contends that when Oliphant was adjudged a bankrupt the state court was without jurisdiction to proceed further in the pending cause, unless the assignee was made a party, and that, as that was not done, the decree of that court, and sale and conveyance thereunder, are nullities, and that, as the land reverted to Oliphant under the limitation in the deed to his wife, after he was adjudged a bankrupt, it was a new acquisition, and his deed invested plaintiff with the legal title.

Judgment, execution, and a return of *nulla bona* thereon, placed the judgment creditor in a position to assail any convey-

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ances made by the judgment debtor to defraud his creditors, and a bill was filed for that purpose, making the judgment debtor and the alleged fraudulent grantee defendants. Proper process issued and was duly served on the judgment debtor, to whom, under the limitation contained in the deed to his wife, it is conceded the legal title to the property reverted upon her death, which occurred soon after the institution of the suit, and after that event Oliphant was the sole proper defendant in the action.

By these proceedings the state court acquired complete jurisdiction over the parties to the suit, and the subject matter of the action; and the plaintiff acquired a lien in equity on the lands mentioned in his bill, and the right, if he established the fraud, to subject them to the payment of his judgment. The law is well settled that the filing of such a creditor's bill, and the service of process in the action, create a lien in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors. *Storm v. Waddell*, 2 Sandf. Ch. 494; *Tilford v. Burnham*, 7 Dana, 110; *Maffitt v. Ingham*, id. 495; *Hartshorn v. Eames*, 31 Me. 93; *Newdigate v. Jacobs*, 9 Dana, 18; *McDurmott v. Strong*, 4 Johns. Ch. 687; *Spader v. Davis*, 5 Johns. Ch. 280; *Carr v. Farrington*, 63 N. C. 560; *Fetter v. Cirode*, 4 B. Mon. 482; *Day v. Washburne*, 24 How. 352; *Clark v. Rist*, 3 McLean, 494.

"It has been aptly termed an equitable levy." *Miller v. Sherry*, 2 Wall. 249. And this lien is not displaced by the subsequent bankruptcy of the judgment debtor, but is protected by the bankrupt act. Section 5075, Rev. St.; *Clark v. Rist*, 3 McLean, 494; *Sedgwick v. Mench*, 6 Blatch. 156; *Parker v. Merggridge*, 2 Story, 334; *Storm v. Waddell*, *supra*; *Carr v. Farrington*, *supra*; *Fetter v. Cirode*, *supra*; *Newdigate v. Jacobs*, *supra*; *McDurmott v. Strong*, *supra*; *Goddard v. Weaver*, 1 Wood, 260; *Yeatman v. Savings Institution*, 95 U. S. 764; *Stewart v. Platt*, U. S. Sup. Ct., October term, 1879, 12 C. L. N. 201.

Conceding that by the bankruptcy of the judgment debtor

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his assignee in bankruptcy acquired the right to make himself a party to the pending creditor's bill, and prosecute the same, it by no means follows that because he did not do so the state court was deprived of jurisdiction. The assignee succeeded to the right the creditors of the bankrupt or any one of them had, or might have obtained, by appropriate action, to avoid any conveyance made by the bankrupt in fraud of his creditors. But in any suit brought by the assignee for this purpose the creditors' liens on the property, whether acquired by creditors' bill or otherwise, would not be displaced or annulled; and, if the suit was successful, the assignee would have to distribute the fund according to priority of liens and right between the creditors. And if the property did not exceed in value the amount of Hartly's lien upon it, and other creditors would derive no benefit from the suit, the assignee acted wisely in not intervening and allowing the lien creditor and the bankrupt to settle the controversy between themselves in the state court without expense to the estate.

"Assignees are not bound to take *all* the property of the bankrupt, but may reject such as may be rather a burden than a benefit to the estate." 1 Deacon on Bank. 535; *Amory v. Lawrence*, 3 Clifford, 523 *et seq.*; *McLean v. Rocky*, 3 McLean, 235; *Rugely & Harrison v. Robinson*, 19 Ala. 404, 417; *Glening v. Langdon*, 98 U. S. 20, 30; *In re Lambert*, 2 Bank Reg. 138.

The judgment creditor filed his bill, had a subpoena served, and thereby acquired a lien before the commencement of proceedings in bankruptcy. He did not prove his debt against the estate of the bankrupt, or in any manner voluntarily submit himself to the jurisdiction of the bankrupt court, but was allowed to proceed to enforce his lien without objection from that court or the assignee. In this state of the case the state court had a right and it was its duty to proceed with the cause; its jurisdiction was complete, and its decree and the title acquired under it are as valid and effectual as if the bankruptcy of the defendant had not intervened. *Sedgwick v.*

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Mench, 6 Blatch. 156; *Clark v. Rist*, 3 McLean, 494; *In re Davis*, 1 Sawyer, 260; *Goddard v. Weaver*, 6 Bank Reg. 440; *Second Nat. Bk. v. Nat. St. Bk.* 10 Bush. 367; S. C. 11 Bank Reg. 49; *Davis v. Railroad Co.* 1 Wood, 661; *Norton's Assignee v. Boyd*, 3 How. 426; *Townsend v. Leonard*, 3 Dill, 370; *Johnson v. Bishop*, 1 Wood C. C. R. 374; *Reed v. Bullington*, 49 Miss. 223; S. C. 11 Bank. Reg. 408; *Waller's Assignee v. Best*, 3 How. 111.

Cases holding a contrary view have been cited in the argument; but all doubts and conflict of authority upon the question have been removed by the authoritative judgments of the supreme court of the United States. *Marshall v. Knox*, 16 Wall. 551; *Doe v. Childress*, 21 Wall. 642; *Eyster v. Gaff*, 91 U. S. 521.

In *Doe v. Childress* the facts were that the land was attached in a suit in the state court in April, 1867, and that the defendant was declared a bankrupt in February, 1868, four months before a decree was obtained in the suit, and seven months before the sale took place under the decree, and the court said: "The Tennessee court of chancery having jurisdiction of the subject of the proceeding in the attachment suits, no defense being interposed by the assignee in the state court, and no means having been taken to arrest their proceedings, or to transfer them to the bankrupt court (if power to take such steps existed), and there being no fraud proven or alleged, we are of opinion that a good title was obtained under the decree of sale made in the state court."

In *Eyster v. Gaff* the facts were that a suit to foreclose a mortgage was commenced in the state court in 1868; that the mortgagor and defendant in the suit was adjudged a bankrupt in May, 1870, and that a decree was rendered in the foreclosure suit in the state court in July, 1870, upon which the property was sold. The bankrupt's assignee did not intervene and was not made a party. The court held that the state court had jurisdiction, and that the decree and sale were valid. Mr. Justice MILLER, delivering the opinion of the court, said: "It

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is almost certain that if at any stage of the proceedings, before sale or confirmation, the assignee had intervened, he would have been heard, to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or take part in the case, deserved no attention and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. * * * This court has steadily set its face against this view."

There is nothing in the case of *Gleaning v. Langdon*, 98 U. S. 20, that conflicts with these views. In that case a creditor, after his debtor had been adjudged a bankrupt, brought a creditor's bill to recover property conveyed by the bankrupt in fraud of his creditors, alleging, as ground for doing so, that the assignee refused to bring the suit, and for that reason making the assignee a defendant. The creditor had no lien on the property, and suit was brought after the adjudication in bankruptcy and the appointment of an assignee, and the court say that in such case the assignee must bring the suit, and point out the proper mode of proceeding by the creditors, in the event that he wrongfully refuses to do so. There was no *lis pendens* and no lien in that case before the bankruptcy, and the property and right of action passed absolutely to the assignee, and he alone had the right to sue.

In the case at bar there was a *lis pendens* and a lien, and the creditor had a right to proceed to satisfaction in the state court unless he was stayed by some appropriate affirmative action of the assignee or the bankrupt court. The distinction in the two cases is obvious, and is clearly pointed out in *Winters v. Olaiton*, 54 Miss. 341; S. C. 18 Bank Reg. 533.

The rule is well settled that an assignee *pendente lite*, whether he be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiff or of the defendant,

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need not be made a party to the bill, and is bound by the decree. Story's Eq. Pl. § 156.

It is generally true that this rule does not apply to assignments by mere operation of law, and it has been held not to apply to an assignee in bankruptcy of the defendant. Story's Eq. Pl. § 158a; *Lowry v. Morrison*, 11 Paige, 237. But the supreme court of the United States, in *Eyster v. Gaff*, *supra*, seems to place assignees in bankruptcy, so far as relates to pending suits to enforce liens on the bankrupt's property, on the same footing as a purchaser *pendente lite*. The court say: "We see no reason why the same principle [that one who purchases *pendente lite* is bound by the subsequent proceedings] should not apply to the transfer made by a bankrupt proceeding."

In that case, as we have seen, pending an action to foreclose a mortgage, the mortgagor was adjudged a bankrupt, and the court, after stating that the assignee might have made himself a party, say that "if he chose to let the suit proceed without such defense he stands as any other person would on whom the title had fallen since the suit was commenced." And see *Carr v. Farmington*, 63 N. C. 560.

The discharge of the bankrupt pending the suit did not discharge or impair the lien acquired by the commencement of the suit. A decree *in personam*, against which the discharge, if properly pleaded, would have been effectual, was not sought or rendered, and the discharge was unavailing against a proceeding *in rem* to subject property to the satisfaction of a lien ante-dating the commencement of proceedings in bankruptcy.

Kilgore v. Cross & Diver.

KILGORE v. CROSS & DIVER.

(Eastern District of Arkansas. ———, 1880.)

1. **CONTRACT — MENTAL CONDITION.** — Facts upon which it was held the mental condition of a party was such as to incapacitate him to enter into a valid contract.
2. **SAME — IMPOSITION — EQUITABLE RELIEF.** — Against the consequences of mistaken judgment, or mere imprudence and folly on the part of one making a contract, courts can grant no relief. But the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented or overcome by cunning artifice or undue influence.
3. **SAME — EXERCISE OF REASONING FACULTIES.** — A party is not bound by a contract entered into when his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties.
4. **SAME — INCAPACITY — EXPERT TESTIMONY.** — Opinions of witnesses not experts are competent evidence on the question of capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which they found their opinions.

CALDWELL, *District Judge.* — The plaintiff was the owner, among other property, of five head of horses, two sets of double harness, and one Concord eight-seat stage coach or wagon. He desired to sell or exchange this property, and having been informed that Cross & Diver, the defendants, had obtained a contract for carrying the United States mail, and were running a street railway in Little Rock, and that they would probably purchase the property, he caused inquiry to be made of them on the subject, and received an answer, in substance, that if he would bring his property from Hot Springs, where plaintiff then was, to Little Rock, they might purchase or trade for it. Encouraged to believe that he could dispose of his property to the defendants, the plaintiff, on the fourteenth day of July, 1878, started from Hot Springs to Little Rock with his stage coach, drawn by four horses, himself driving. In or near Hot Spring the horses drawing the coach took fright, ran away and overturned the coach, seriously injuring

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the plaintiff. The extent and character of this injury is the turning point in this case and will be more fully considered hereafter.

On the next day after he received his injury the plaintiff directed one of his hired men to take his coach and five horses to Little Rock and sell or trade them at his discretion, and on the sixteenth of July his hired man proceeded to Little Rock with the property upon the understanding that he was to sell or dispose of the same for the plaintiff according to his own discretion, unless the plaintiff should, himself, go to Little Rock by rail the next day.

On the seventeenth of July the stock and coach arrived at Little Rock, and were put up at defendants' stable, and in the afternoon of the same day the plaintiff arrived by rail. The next day the plaintiff and defendants effected an exchange of property, as follows: The plaintiff gave the defendants his five horses, two sets of harness, and stage coach and \$150, for an old glass front Clarence carriage. The \$150 was not paid in money, but the plaintiff gave his note for that sum; and, to secure its payment, executed to defendants a mortgage on the carriage. The defendants loaned plaintiff a span of horses to haul the carriage which he received in the trade to Hot Springs, and it was driven to the latter place by the plaintiff's hired man.

The plaintiff arrived at Hot Springs with the carriage on the nineteenth or twentieth of July, and within a week thereafter returned to Little Rock with the carriage, and tendered it back to the defendants and demanded a return of the property which they had received from him for the carriage, upon the ground that at the time he made the trade he was *non compos mentis*.

The defendants refused to rescind the trade, and thereupon the plaintiff filed his bill, alleging that by reason of the injury plaintiff received when thrown from his coach he was, at the time of the trade, incapable of transacting business, or knowing what he was doing, and was in fact *non compos*

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mentis; and that defendants, knowing his condition, fraudulently worried and bewildered him, by artful language and constant offers and proposals, until they finally induced him to make the trade. The bill prays for a rescission of the contract and a return of the property, or judgment for its value.

There is much conflict in the evidence in relation to the value of the property included in the trade, the valuation of plaintiff's property by the witnesses running from \$650 to \$1,400, and of the defendants' carriage from \$250 to \$800, but the weight of evidence warrants the conclusion that the property which defendants received from the plaintiff was worth, at a fair cash valuation, \$750, exclusive of the mortgage for \$150, and that on a like scale of cash valuation the carriage which plaintiff received from the defendants was not worth at most over \$400. In other words, the plaintiff agreed to pay for the carriage more than twice its value in this or any other market, and this disparity in the value of the property given and received does not disclose the extent of the plaintiff's improvidence and folly in making the trade, for the only use plaintiff had for the carriage, and the use to which he expected to put it, so far as he had any comprehension on the subject, was that of a public hack or carriage to carry passengers in and about Hot Springs. Its age and construction rendered it unfit for such service on the rough and rocky roads of that region, and at that place and to the plaintiff it was worth but little more than the amount of the mortgage lien retained upon it by the defendants.

The evidence as to the mental condition of the plaintiff at the time he made this contract is voluminous and somewhat conflicting, but the weight of evidence establishes these facts: That the plaintiff, for some years preceding the making of this trade, had been first a stage driver, and afterward a mail contractor and proprietor of horses and mail coaches, and that for some months immediately preceding the trade he had been at Hot Springs engaged in keeping hacks and other vehicles and teams for carrying persons and hauling freights

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for hire. In the conduct of this business he employed two or more teamsters, and was unusually diligent and careful in the direction and management of his business, and the care of his property, attending at the stable where his stock was kept early and late, exacting from his hired men the strictest attention to their duties, constantly supervising them himself, and seemingly indisposed to trust the care and management of his stock to any one. He was a good judge of vehicles of all kind and horses, and knew their value; was a shrewd and close trader in such property, and those who dealt with him had to pay full value for what they got. When his team ran away with him on the fourteenth of July, and upset his coach, he was thrown from the driver's seat, and his head and other parts of his body struck the ground with considerable force. He was conveyed to his boarding-house, and Dr. Barry, a reputable physician of more than twenty years' practice, called to see him. The doctor found him suffering from concussion of the brain, and a painful injury to the foot or ankle-joint. He was then, in the language of the doctor, "partially delirious, and his acts and speeches indicated a deranged condition of mind." The doctor saw him no more, but he testifies that the condition of mind in which he found him might have continued ten or fifteen days, and other witnesses testify that there was no change in his condition up to the time the trade was made. Those who were with him during this time testify that he begged them to kill him, threatened to commit suicide, seemed utterly indifferent as to what became of his property; that he was in this condition when he directed his hired man to take his property to Little Rock and dispose of it; that he was in this condition when he arrived at Little Rock, and during all the time he remained there; that he had to be assisted in and out of the hack, and could walk with difficulty by the aid of crutches; that he seemed to be suffering intense pain from his injuries, and had to be watched while in bed at night; that the night after he got to Little Rock, in the absence of his watchers, he got out of his bed,

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and went out in town at one or two o'clock in the morning to find a purchaser for his property; that against the earnest protest and advice of his hired man he made the trade in question that morning; that he exaggerated the value of the carriage he got, saying that it was worth \$10,000, and that the speaking tube, extending from the inside of the carriage to the driver's seat, was worth \$500. Other acts and speeches of plaintiff are detailed by the witnesses, going to show his reasoning faculties were more or less deranged. His condition remained the same for four or five days after the trade, when his mind seemed to be restored to its normal condition, and he inquired for his property, and seemed quite confounded when told he had traded it for the carriage. He testifies that he has no knowledge or recollection of anything that he said or did from the fourteenth of July, the date he received his injury, until the twenty-second day of that month.

Persons who saw the plaintiff casually during this time testify that they observed nothing in his speech or action to indicate that he was not sane; but those who were well acquainted with him, and who were with him much before and after the injury, and who had the best opportunity of forming a correct opinion on the subject, agree in saying he was not in his right mind, and was utterly incapable of transacting business, or forming or exercising a deliberate and intelligent judgment on any subject.

Opinions of witnesses not experts are competent evidence in cases where the object is to prove capacity or incapacity to make a contract when the facts or circumstances are disclosed on which they found their opinions. *Kelly's Heirs v. McGuire*, 15 Ark. 555, 601.

In answer to a hypothetical question, which fairly stated the plaintiff's condition as disclosed by the evidence, Dr. Barry gives it as his opinion that the facts indicate a deranged condition of mind at the time the trade was made.

One of the physical causes of insanity is severe injuries to

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the head from blows, causing concussion of the brain. The evidence satisfactorily establishes the fact that the fall plaintiff received produced concussion of the brain, and that this condition continued until after the trade with defendants.

Against the consequences of mistaken judgment or mere imprudence and folly on the part of one making a contract, courts can grant no relief. If the party was capable of entering into a contract, and there was no fraud, it is binding, though it may be obvious that he acted improvidently, and paid for property purchased greatly more, or received from property sold greatly less, than it was worth.

It is impossible to define with exactness the degree of unsoundness of mind that renders a party incapable of entering into a binding contract. Weakness of understanding, or that deficiency of intellect which errs in judgment and easily makes mistakes, is not enough of itself to avoid a contract. But the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning artifice or undue influence. 1 Story Eq. Jur. § 238.

In *Kelly's Heirs v. McGuire*, 15 Ark. 555, 603, the court say: "If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or resist importunity or undue influence, a contract made by him under such circumstances will be set aside;" and in *Beller v. Jones*, 22 Ark. 92, 99, the court said: "No evidence was introduced by Jones so effective, none could be introduced more convincing, to show mental derangement or want of natural sense, as is the agreement itself charged by him and admitted by Beller to have been made."

It must be conceded that the contract from which the plaintiff seeks to be relieved cannot be said to be so grossly

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improvident as in itself to justify the conclusion of insanity on his part, or fraud on the part of the defendants; nevertheless, its improvidence and folly are an important circumstance, tending to strengthen the conclusion, supported by the evidence, that his mental capacity was not adequate to the making of a valid contract, for it shows that in the very matter under consideration he did not act like a sensible or sane man, but quite the contrary.

It is obvious from the evidence that the plaintiff, at the very time he made this trade, ought to have been in his bed receiving proper medical treatment for his injuries; and he probably would have been there if the purpose of visiting Little Rock to dispose of his property had not been the one thought fixed in his mind and in course of execution at the moment of the injury. In his delirious condition, after the injury, he fancied that purpose must be carried out; and his trip to Little Rock, while laboring under concussion of the brain, and suffering excruciating pain from the injury to his ankle, was itself an insane act, or at least an act that no man in the full possession of his senses would have attempted.

A party is not bound by a contract entered into where his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties. While the plaintiff's injuries did not produce a total eclipse of his mental faculties, they did so weaken and derange them that he was not capable of comprehending the subject of the contract, and its nature and probable consequences, and he is not, therefore, bound by it. It is a fortunate circumstance that the carriage received by plaintiff from the defendants has been securely housed during this litigation, and that it remains in the same condition as when plaintiff received it, so that defendants can be placed in *statu quo*. The defendants having parted with the property received from the plaintiff must account for the fair cash value of the same at the time the trade was made, which is found to be \$750, and six per cent. interest on the same to date of decree.

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The cross-bill of defendants, seeking to foreclose the mortgage on the carriage, given to secure the \$150 "boot money," must be dismissed, and the defendants required to surrender the notes and mortgages for cancellation, and to pay all costs.

RIDGWAY TOWNSHIP v. W. D. GRISWOLD *et al.*

(District of Kansas. June, 1878.)

1. CORPORATIONS—EFFECT OF CONSOLIDATION.—The usual effect of the consolidation of two railway companies is to extinguish the two constituent companies and make of them one new company.. *Clearwater v. Meredith*, 1 Wall. 25; *Tomlinson v. Branch*, 15 Wall. 460.
2. SAME—STOCKHOLDER.—A stockholder in one of the original constituent corporations becomes, upon the consolidation being perfected, a stockholder in the new company, and the new company, unless otherwise provided, succeeds to the duties as well as to the rights of the old. A bill brought by a stockholder after the consolidation, upon the theory that he is a stockholder in the *old* company: *Held*, not to be maintainable.

On motion to dissolve injunction.

The bill in this case is filed by the plaintiff, in its capacity and right as a stockholder in the Lawrence and Carbondale Railroad Company—hereafter called the Carbondale Company.

The defendants, Griswold, Carr & Deming, claim the property heretofore belonging to that company and the St. Louis, Lawrence and Denver Railroad Company, under two mortgage foreclosures, one in this court on a first mortgage and one in the state court under a second mortgage. Neither of these railway companies is a defendant. The plaintiff subscribed \$25,000 to the stock of the Carbondale Company, on condition that the company should build and complete its road to or near Carbondale and maintain a permanent station in or near that place, in the plaintiff township. Bonds were issued by the plaintiff to pay for the stock thus subscribed,

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and these have been negotiated and sold. On the twenty-eighth day of June, 1872, the two companies above named, under the authority of the statutes of Kansas, with the recited assent of two-thirds of their stockholders, made an agreement to *consolidate* the two companies and the capital stock thereof, and approving of the contract with one McMillan for the construction of the road. This was after the plaintiff's subscription of \$25,000 to the Carbondale Company, one of the constituents of the consolidated company. The consolidated company made the two mortgages of its property, including the property of the Carbondale Company, and these mortgages were foreclosed and the property sold under the decrees to the defendants above named. The mortgages did not embrace the "franchises" of the company, but included all its property. Owing to the construction of other roads and to other causes, the consolidated company became hopelessly insolvent, and the receiver appointed to operate the road *pendente lite* could not earn enough to pay the expenses of operating the same. The present defendants do not operate it, and make an uncontested showing that it will not pay to operate the road, and that the property is valueless as a railroad. This fact is not disputed; at least has not been. And these defendants (the purchasers at the foreclosure sale) say that they do not intend to organize a new company to operate the road, and they make a showing that the only value of the property consists in the removable materials, chiefly the old iron rails.

The defendants were proceeding to remove this iron, etc., whereupon the plaintiff township filed the present bill, the main prayer of which is that the defendants be enjoined from interfering with the superstructure of the road, the road-bed, etc., and from removing the iron, ties, etc., and for general relief.

Mr. Bradford, with whom *Mr. Martin*, for defendant.

Mr. Usher, for defendants.

DILLON, *Circuit Judge*. — On the argument at the bar, the

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learned counsel for the plaintiff township conceded that this bill was brought upon the theory that no legal consolidation of the two companies had been effected; that therefore the Carbondale Company (in which the plaintiff originally took stock and with which it made its contract in respect to building and operating its road) is still *in esse*, and the plaintiff still a stockholder therein; that the mortgages executed by the consolidated company, so far as it embraced the line or property of the Carbondale Company, was void, and the decrees of foreclosure and the sales thereunder to the defendants conferred no title to the property of the Carbondale Company.

Therefore, the plaintiff claims, the Carbondale Company is and always has been a distinct corporation; that consequently the plaintiff is an existing stockholder therein; that the defendants have no title or right to the property they purchased at the foreclosure sales, and hence the plaintiff as a stockholder, and by virtue of the company's agreement when obtaining the subscription, has a right to have the defendants restrained from interfering with the property of the Carbondale Company or removing the ties, iron, etc., belonging to that company, since the company (as alleged) refuses to act or to bring this suit. I have carefully examined all the record evidence in the case, and it has convinced me that the plaintiff is mistaken in supposing that no consolidation was effected, or that the mortgages were void, or that nothing passed by the foreclosure decrees and sales; and therefore the basis of the bill, as framed, as well as the theory on which it was attempted to be supported in argument, has wholly failed.

The supreme court of the United States has decided what is the effect of consolidation of two railway companies. It extinguishes, unless otherwise provided, the two constituent companies and makes of them one new company. *Clearwater v. Meredith*, 1 Wall. 25; *Tomlinson v. Branch*, 15 Wall. 460.

The plaintiff township, upon such consolidation being perfected, would become a stockholder in the new company, and the new company would, unless otherwise provided, succeed to the duties as well as the rights of the constituent companies.

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The plaintiff's bill, brought upon the theory that it is a stockholder in the *old* company, is, as it stands, wholly defective. And as a stockholder's bill it is also fatally defective in not making the railroad company in which the plaintiff alleges itself a stockholder, a party defendant. *Davenport v. Dows*, 18 Wall. 626.

If the plaintiff township claims that the defendants, as the purchasers of the property at the foreclosure sale, are bound to operate the railroad; or if not, that they have no right to remove the property they purchased, even if they acquired a title thereto by virtue of the foreclosure proceedings, the bill as it stands is not adapted to present these questions even if a court of equity is the proper tribunal in which mainly to litigate them or either of them.

As the statute of Kansas authorized the making of the mortgages on the property of the company; as the mortgages did not embrace the "franchises;" as it appears that the defendants do not intend to organize a new company and acquire the right to operate the road, and that the road if operated cannot be made to pay the expenses of operating it, I confess I do not see how the state or the plaintiff can compel the defendants to operate it; and if they cannot thus be compelled, I do not now see why they should be restrained from removing the iron rails and ties, if they are worth more to them if removed, than if left to rust and rot in the road-bed. But these questions have not been deliberately considered by me, and they will be left open in case the present bill is amended or a new bill or a new proceeding be brought.

In any view, the plaintiff's rights are so doubtful, especially on the bill as it stands, that my opinion is that the injunction should be dissolved.

It seems to be a hard case for the township; but probably it is no more so than it has proved to the other stockholders; and it would appear that the bondholders, whose money mainly built the road, have suffered from an enterprise, which, if not misconceived, has wholly collapsed.

If Judge FOSTER, who sat at the argument, concurs in the

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foregoing, let an order be made dissolving the injunction. If he does not concur, the motion may stand for further argument at the next term.

FOSTER, *District Judge*.—I concur in the order dissolving the injunction.

INJUNCTION DISSOLVED.

KIRBY BUNG MANUFACTURING CO. v. WHITE AND OTHERS.

(*Eastern District of Missouri*. March, 1880.)

1. PATENT — RESTRAINING ORDER.— The function of a restraining order is to protect the plaintiff without unnecessarily oppressing or annoying the defendant, and will, therefore, be framed according to the circumstances of each case.
2. SAME — DECREE OF COURT — GROUND FOR RESTRAINING ORDER. — In the case of an infringement, the final decree of a court of competent jurisdiction, restraining the validity of a patent, in the absence of collusion, furnishes a sufficient basis for an injunction or some form of a restraining or accounting order.
3. SAME — PROOF IN ABSENCE OF DECREE. — "If there has been no decision as to the patent by a United States court, on the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor."

TREAT, *District Judge (orally)*.—The case of Kirby against several defendants is before the court on a motion for a provisional injunction. It is a patent case. It may not be known to counsel, who appear here from another circuit, what the uniform rule is in this circuit as to applications for provisional injunctions. An injunction is the strong arm of equity. It should never be allowed to operate oppressively upon any one, but be used for the purpose of securing the rights of the complainant in the case pending the litigation, without unnecessarily injuring the other party. Were it otherwise, the injury resulting might be very serious. For instance, in the milling cases before us, Mr. Justice MULLER allowed the defendants' mills to continue in operation

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on giving bonds of \$125,000 or \$150,000, instead of granting an injunction in the first instance, which might have closed all the mills in the northwest. If he had stopped all of the mills by the issuance of an injunction *simpliciter*—it having been finally determined that the complainants' patent was invalid,—there would have been a great wrong perpetrated upon the parties defendant. Hence, the rule is this,—and is the true rule in equity, as settled in this court by Justice CATRON, and existing up to the present hour, and I am authorized by Judge McCREARY to say that he fully concurs,—that the function of a restraining order is to protect the plaintiff without unnecessarily oppressing or annoying the defendant. Whether restraining orders go out in patent cases, or in other cases, they are framed according to the circumstances of each case, to wit: In one case there may be such circumstances as require an injunction *simpliciter*, but ordinarily a bond and order for accounting suffices, and sometimes simply an order for an accounting. Hence the form of the order varies with the circumstances. I make these preliminary remarks so that parties may understand that an injunction *simpliciter* is not to be had for the asking. I am very well aware that the practice under the state laws is different, if it now is the same as years ago. Under the state practice there is but one form of a restraining order, to wit: If an injunction is asked for provisionally, it must issue as an injunction *simpliciter*. This is not the rule in equity, and has never been the rule in the courts of this circuit. The course in these preliminary matters is to protect the complainant without unnecessarily injuring the defendant.

There is a patent presented to the court for a bung-cutting machine. It is a combination patent, and a very commendable patent in itself. The various devices work automatically to effect the desired end. This patent has been before the circuit court of the United States for the district of Indiana, and a decree was ordered by Judge DRUMMOND in favor of the complainant; and not being familiar with the facts of that

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case, we take it for granted — as the law requires — that it was a correct decree, upholding the validity of the patent. By a reference to the proofs I see that the matter was very fully considered, and the “claims” involved in this suit are said to be valid and subsisting “claims.” For the purposes of a provisional injunction under the patent law two things, or either of two things, may exist, to wit: As in this case, a court, after full consideration of the matter, has rendered a final decree upholding the validity of the patent, that is a sufficient basis in itself for an injunction or some form of a restraining or accounting order, provided the party defendant in the particular case has infringed the patent; in other words, the court, on a motion for a provisional injunction, does not go into the merits to ascertain the validity of the patent. *Prima facie* the patent is valid; but under the uniform rulings of the courts of the United States for more than half a century, if there has been no decision as to the patent by a United States court, on the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor. But if the court, after a due consideration of the matter, has reached the conclusion that the patent is valid, on this provisional matter the inquiry is not open.

The United States circuit court, sitting in Indiana, Judge DRUMMOND giving the opinion, decided after a fair contest — for from the record it seems to have been a *bona fide* contest — that this patent is valid. I make the remark “after a fair contest,” because sometimes it has been supposed that a mere decree entered *pro forma* on the merits is sufficient in itself to require all other United States circuit courts to grant a provisional injunction. Not so. We have held in this circuit that it must have been an honest and not a collusive matter. In a case in the United States circuit court of Alabama, a matter formerly arose which illustrates my remark.

When one of the most distinguished lawyers of New York was before me, he cited a case which was decided in Califor-

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nia, and which, on an examination of the record, I found to be a sham case, the decree being obtained by collusion, in order to allow parties who held the patents to put under restraint parties refusing to submit to their demands; and, of course, I considered it of no force. Just so in the Alabama case. It was another one of collusion. Perhaps there has been a more remarkable illustration arising out of the milling cases, concerning what are known as the "new process" patents. An alleged collusive case arising as to these patents went to the supreme court.

When one of these matters is presented to the judges of the circuit court they are bound to see whether it was a "consent" or collusive decree, in order to form a basis on which the party obtaining it might go through the country levying tribute. Such is not this case. This is an honest case—has been fully considered, and everything connected with it appears to be a fair and honest contention. In making these remarks I make them in a general way. Here is a case which has been decided after a full and fair contest by parties struggling for their respective interests in the matter.

We come now to a consideration of what the patent is. As already stated, the matter in controversy here is as to one of a number of devices to effect a particular end. It is a little remarkable that in this case there is no disclaimer. Ordinarily, after the specifications set out the condition of the art, etc., it disclaims certain things. This patent does not. The patentee divides his claims into five parts. It is alleged that the fourth claim is infringed. Without a model of the drawings those who listen to me could hardly understand the claims of the patent. We find that the principal object was this: That inasmuch as the old cutting board, which constantly became frayed or chipped when a fish-mouth chisel was used, and great difficulty and trouble occurred, Mr. Kirby invented an automatic contrivance by which through (or over) the fish-mouth chisel there would be conveyed little square blocks, the diameter of which would be the diameter of the

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bung desired, with a slide pushing over the mouth of the chisel one block on top of another. But the chisel being fish-mouthed, of course it would be passed into the upper block a short distance; and that block thus answers the ordinary purposes of a cutting board, sliding another on top of that, so that it continued successively to utilize each block and give the bung desired without the loss of any material. He had a very ingenious arrangement for that, and it operated with the whole machine, automatically. But that involved a cone, eccentrics, various bars, slats, slides, etc., which it would take too much time to explain, unless I had the model before me.

The patentees' claim is described by himself as follows:

"1. The chisel or cutter D, with cylindrical cavity, in combination with the plunger C, and feeding bar *i*, constructed and arranged substantially as described, for the purpose of cutting bung blanks from separate square blocks of wood.

"2. The combination of feeding slide-bar *i*, feed-box C, guides *oo*, and spring *o*ⁱ, for feeding successively one of a series or pile of bung-blocks forward in exact line with the cutting edge of the chisel of a bung machine, operating substantially as described.

"3. The cutter D, feeding slide-bar *i*, and plunger C, so arranged relatively to each other as that the cutter or chisel shall, when cutting, have at least two blocks or blanks in line with its cutting edge, and that at each stroke of the machine the cutter shall finish cutting one block or blank, and enter and partly cut a second blank, instead of cutting a single blank at each stroke, substantially as and for the purpose hereinbefore described.

"4. The cutter and feeding device of a bung-cutting machine, arranged substantially as hereinbefore described, as that each block as it is fed into the machine shall serve as a cutting board for the next preceding block.

"5. The use of the hinged bar *m*, in the slot of the sliding feed bar *i*, in combination with the vibrating shaft *h*¹, whereby, by raising the bar *m*, the motion of the feed bar *i* is suddenly

Kirby Bung Manufacturing Co. v. White.

arrested, without stopping the motion of the other parts of the machine."

The fourth claim is the one which it is alleged the defendant infringes. Now, if the combination for placing one block after another on the fish-mouth cutter, whether underneath or sideways, vertical or longitudinal, so as to operate as a cutting board through which that fish-mouth may penetrate, is an infringement of this patent, the complainant would be correct. But it is not so. It is a particular way of doing a particular thing. It is a mechanical device wrought out by combinations, which combinations are not in defendant's machine.

To support this motion the complainant, Mr. Kirby, gives a general affidavit, which on examination amounts practically to nothing more than his verification of the original bill. On the other hand, we have a description given of what the defendant's operations are. They are not produced by plaintiff's combination of mechanical devices. The consequence is that the motion must be denied. But it is proper to remark, in this connection, that it is desirable that on these motions for preliminary injunction the court should give no elaborate opinions because the merits are not fairly before it; and this case illustrates it. We have the opinion of the complainant in the bill that the defendant has infringed his patent, but what does that amount to? He ought to give us what the defendant is doing. It is not for him to assume the functions of the court and swear that his case is as he has averred. He should give the facts to the court and let it determine on those facts whether there is an infringement or not. On the other hand, we have from the defendant a description of what he is doing, illustrated by drawings.

In this imperfect state of the case, without passing upon the merits, the court decides that there is nothing before it at this stage of the case to show an infringement. That is all the court decides this morning.

The motion for a provisional injunction is denied.

McCREARY, *Circuit Judge*, concurred.

Bussey v. Excelsior Manuf'g Co.

BUSSEY v. EXCELSIOR MANUF'G CO.

(Eastern District of Missouri. February, 1880.)

PATENT—INFRINGEMENT—DAMAGES—EVIDENCE.—A rescinded contract in relation to the payment of royalty for the use of a patent is not competent evidence in determining the measure of damages for the infringement of the same.

Exceptions of complainant to report of master as to assessment of damages.

Sprague & Hunt, for complainant.

Samuel S. Boyd, for respondent.

TREAT, District Judge (orally).—Complainant relied for the measure of damages upon a rescinded contract, wherein the respondent agreed that if all or any of the several patents named therein were used by the respondent, one dollar royalty for each stove manufactured should be paid. There was no other evidence offered before the master. Now, as said contract had no longer any existence, and the court held that but two of the several patents were infringed, it became necessary to ascertain, in some intelligent manner, the damages sustained by the complainant for the use thereof. No evidence on that subject was offered, and thereupon the master reported nominal damages. The contention is that he should have gone back to the rescinded contract, and applied the terms thereof to the condition of affairs after such contract ceased to be obligatory. The court holds otherwise. The exceptions are overruled, the report confirmed, and costs divided as heretofore ordered.

Johnston v. Roe.

JOHNSTON, Receiver, etc., v. ROE and others.

(*Eastern District of Missouri. April, 1880.*)

EQUITABLE JURISDICTION OF FEDERAL COURTS — STATUTE OF LIMITATIONS. — A federal court will assume equitable jurisdiction of a suit by a receiver of a bank against the estate of a decedent for the recovery of a debt alleged to have been fraudulently concealed, although the claim is barred by the statute of limitations of the state in which such court has territorial jurisdiction.

In equity. Demurrer to bill.

John B. Henderson and Patrick & Frank, for complainant.

Glover & Shepley, for respondents.

MCCRARY, Circuit Judge. — The claim sued on originated in the execution of two promissory notes by John J. Roe, one dated February 28, 1867, for \$65,000, and the other dated March 4, 1867, for \$35,000, payable on call and to himself. The fraud and breach of trust charged against said John J. Roe as a director of the National Bank of the State of Missouri, is alleged to have been committed on the fourteenth day of April, 1868, and consisted, as the bill avers, in certain entries upon the books of said bank made by said Roe, who was one of the directors, in collusion with the other directors of the bank. It is averred that said notes, and other similar notes given by other directors, had been discounted by the bank, and were held by it as part of the assets, and that on the date last named entries were fraudulently made upon the books of the bank showing payment thereof, though no part of said notes, or either of them, except interest up to that time, had been paid, and no payment thereon has been since made. This of course makes, if true, a clear case of indebtedness from said Roe to the bank. The indebtedness, according to these allegations, accrued as early as the fourteenth day of April, 1868. John J. Roe died on the fourteenth day of February,

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1870. His estate was administered upon under the laws of Missouri, and this claim was not proven before the probate court. Said estate has been fully administered by the administrator, and the administration closed. Certain real and personal property left by the deceased having passed to the defendants herein, as his heirs, this suit is intended to subject the same to the payment of the plaintiff's demand, the bill for this purpose having been filed on the seventeenth day of June, 1879.

It will thus be seen that the cause of action accrued nearly two years before the death of John J. Roe, and more than ten years prior to the bringing of this suit, and is therefore barred by the statute of limitations of Missouri (if that statute is to be followed here), unless the plaintiff has taken the case out of the statute by the allegations of his bill concerning the concealment of the alleged fraud and its discovery. Upon this point the bill alleges, in substance, that the fraud complained of was concealed by the directors of the bank (said John J. Roe, up to the time of his death, being one of them), in collusion with the cashier, whereby the said national bank, and its stockholders and creditors, were kept in ignorance of the facts until July 10, 1877, when the fraud was discovered by the complainant. It is further alleged that the claim here sued upon arises out of the breach of an express trust by the said John J. Roe and his associates, and for that reason said statute of limitations does not affect the complainant's right of recovery herein, and it is alleged generally "that, in consequence of said fraud, and the concealment thereof as aforesaid, the claim here sued upon is, in equity, excepted from the operation of the statute of limitations, in order to prevent such statute from operating as a fraud upon said bank, and your orator, as Receiver thereof."

I am of the opinion that there is a sufficient averment in the bill of a fraudulent concealment of the cause of action, and the question, therefore, is whether, notwithstanding such concealment, the defendants can successfully plead the statute of limitations.

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The statute of Missouri concerning administration requires the presentation of all claims against an estate within two years from the time of the publication of a notice of the administration to creditors, and it declares that "all demands not thus exhibited within two years shall be forever barred." There is a saving clause in favor of infants, persons of unsound mind, persons imprisoned, and married women, but nothing is said as to cases of concealed fraud. 2 Wagner's St. 68, 102.

The general statute on the subject of the limitation of actions provides that, in an action for relief on the ground of fraud, the cause of action shall be deemed not to have accrued until the discovery of the fraud by the aggrieved party. 1 Wag. St. 747.

It is earnestly contended, on behalf of the respondents, that, according to the construction placed by the supreme court of Missouri upon these statutes, the action is barred, notwithstanding the discovery of the fraud within two years. Upon this subject counsel insist:

First. That the statute regulating the prosecution and collection of claims against an estate absolutely bars all demands not exhibited within two years, and that, since no exception is made by the statute itself in favor of demands growing out of concealed fraud, the court is not at liberty to engraft this exception upon the statute.

Second. That the general statute of limitations, which does contain a provision declaring that in actions on the ground of fraud the cause of action shall be deemed not to have accrued until discovery by the aggrieved party, does not apply to this case.

Upon the first proposition, we are referred to *McKenzie v. Hall*, Adm'r, 51 Mo. 303; *Richardson v. Harrison*, 36 Mo. 96; and upon the second, to *Rogers v. Bronson*, 61 Mo. 187.

Without determining whether these authorities sustain the proposition stated, we turn to another inquiry, which necessarily requires prior consideration. Is it true that the courts of the United States are bound to follow, as rules of decision

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in equity cases, the statutes of limitation of the several states, and the construction given to them by the state judiciary? It is insisted that under the twenty-fourth section of the judiciary act (Rev. St. § 721), the statutes of limitation of the several states, where no special provision has been made by congress, form the rule of decision in the courts of the United States, and that the same effect is given to them as is given in the courts of the state. Such is undoubtedly the rule in cases at common law, and the statute, by its terms, applies to no other cases. I think it well settled that a federal court of equity is not bound by such statutes, and much less by the construction given to them by the state tribunals. In the exercise of the chancery jurisdiction conferred by the constitution and laws of the United States, this court is not governed by the state practice. The supreme court has repeatedly decided that the rules governing the exercise of this jurisdiction are the same in all the states, and are according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law. The exercise of this jurisdiction is regulated by the act of 1792 (Rev. St. § 913), which declares that the modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. The rules of decision in equity cases in the federal courts are to be uniform, and in the exercise of their equity jurisdiction those courts are unaffected by state legislation. *Boyle v. Zachary*, 6 Pet. 658; *United States v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Noonan v. Lee*, 2 Black, 507; *Robinson v. Campbell*, 3 Wheat. 323.

The only question, therefore, is whether this court should, upon principle, adopt and follow the statute of limitations of Missouri as construed by the supreme court of that state. If the interpretation given to the rulings of the supreme court of Missouri by the counsel for defendants is the true one, I do not hesitate to say that this court cannot follow those rulings. The statute, thus construed, would be in direct conflict with a well-

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settled rule of equity jurisprudence as understood and administered in the federal courts for many years. It would require this court to hold that, in a case where the demand happens to be against an estate, a party who has committed a fraud may consummate it beyond the possibility of remedy by concealing it. This seems to me to be a proposition that no court of equity can, with propriety, maintain, if left free, as this court is, to consider it upon the merits. In cases where the federal courts follow, in equity, the state statutes of limitation by analogy, they do so because equity requires it, and the statutes are found to be in harmony with its general principles.

The rule that the statute of limitations does not run in favor of one who perpetrates a fraud while he conceals it from the party injured, as a general doctrine of equity jurisprudence, is too well settled to require the citation of authorities.

The demurrer to the bill is overruled.

THE UNITED STATES v. ADAM GLAB.

(*District of Iowa.* October, 1876.)

INTERNAL REVENUE—LICENSE—RIGHT OF ONE PARTNER UNDER LICENSE TO FIRM AFTER DISSOLUTION. — Where license for carrying on business as brewers was issued to the firm of A. & G. for one year, and before the year expired G. purchased A.'s interest in the business, and continued the business at the same place till the end of the year, and not elsewhere by either partner, — *held*, no violation of the law.

Writ of error to district court.

James T. Lane, District Attorney, for the United States.

T. S. Wilson, for defendant.

This is a civil action to recover the penalty imposed for carrying on the business of a brewer, without having paid the special tax therefor required by law.

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The answer sets up former acquittal and general denial.

By stipulation, the cause was tried alone upon the general issue on the following agreed statement of facts:

"That on the first day of May, 1874, Glab & Sness, a co-partnership, paid their special tax for carrying on the business of brewers of first class by the said firm, and took proper receipt therefor.

"That said firm carried on said business thereafter, until the first of August, 1874, when the said firm was dissolved, and the said Glab purchased the interest of said Sness in said firm and business of brewing, and thereafter carried on the said business of a brewer of the first class, at the same place, during the remainder of the year covered by said license, viz.: To the first of May, 1875, without having paid a special tax therefor, other than that paid by said firm, and took out no license in his own name."

The question raised, therefore, is this: Whether, under the circumstances, said Glab could carry on said business of a brewer at the same place, in his own name, for the remainder of the license year, without the payment of a special tax, in addition to that paid by the firm.

The district court gave judgment for the defendant, and to reverse this judgment the case is brought by writ of error to this court by the government.

DILLON, *Circuit Judge*. — As the same business was carried on in the same place by Glab, and not elsewhere by either partner; as no new member was introduced into the firm on the dissolution; as there is no express requirement in such a case that a new license shall be taken out by the successor, guided by the provision that "any number of persons doing business as a firm at any *one place*, shall be required to pay but one special tax" (Rev. Stat. sec. 3234); and by the spirit of the analogous cases as to *succession* in business provided for by section 3241, and influenced by the consideration that the government received its revenue on this

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business in this place for a year, and is not therefore deprived of any revenue in fact, and that within the limitations of this case no door is open for fraud, I am of opinion that, upon the special facts, the judgment of the district court was right.

AFFIRMED.

Affirmed, also, in the supreme court.

UNITED STATES v. LOUP.

(*Eastern District of Missouri. April, 1880.*)

INTERNAL REVENUE—POSSESSION OF PARTS OF STAMPS PREVIOUSLY USED ON SNUFF JARS—REV. ST. § 3376.—The possession of parts of internal revenue stamps which had been previously used upon snuff jars does not constitute an offense within the terms of section 3376 of the Revised Statutes, relating to the fraudulent possession of cancelled stamps, although the facts indicated a fraudulent purpose upon the part of the defendant.

Case certified up to the circuit court after trial and verdict in the district court.

William H. Bliss, District Attorney, for the prosecution.

John H. O'Neill, for defendant.

TREAT, *District Judge*.—The question presented involves the construction of the United States statutes pertaining to internal revenue, and particularly section 3376. The defendant is charged in the indictment with having had in his possession internal revenue stamps that had been theretofore used and cancelled. It appears from the arguments and statements of counsel, rather than otherwise, that the facts are that defendant did have in his possession parts or halves of several stamps which had theretofore been used, which could readily be placed on a package in such a position as to give them the appearance of a complete stamp; but no complete, unbroken or unutilated stamp.

Under the stipulation of counsel this court is asked to determine whether, on such a statement of facts, the defendant can be found guilty of the offense charged under section 3376.

Reference has been made to many other sections of the statute, supposed to be *in pari materia*; and, on the other hand, the rules of construction as to criminal statutes have been invoked. Where a statute containing many provisions as to distinct subjects, each of which has its own peculiar requirements, is presented for interpretation, the requirements and penalties of one cannot, in a criminal proceeding, be imported into another. Stamps, according to the law and regulations, are to be placed on packages of snuff in a prescribed manner, whereby the opening of the package will destroy the stamp. As to brewer stamps, the statute is very specific as to the mode of placing them on the packages and destroying them; and, as to stamps to be used for some other purposes, it is provided that they shall be "utterly" destroyed, etc.; yet as to snuff stamps no such requirement exists, because it is presumed that if attached as demanded they will necessarily be ruptured or torn into parts. The fact that more specific provisions are contained in the statutes as to other articles would indicate, not that such provisions should obtain as to snuff, but that snuff stamps were intended to follow a different rule—a rule specific as to them.

The statute has several provisions which will adequately protect the government against fraud by manufacturers or dealers in stuff without importing into section 3376 words not there. It would have been very easy for congress to have enacted that the possession of any part of a stamp previously used should be punishable, if such had been the purpose; or it might have been enacted that the possession of parts which were capable of being united or reunited, etc., should be an offense. When the specific mode of using stamps for tobacco and snuff, as prescribed by the statutes and regulations thereunder, is considered, it is evident that section 3386 contem-

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plated stamps detached as a whole, and not the mere possession of fragments of stamps, no matter how capable of being used.

If stamps previously used are again affixed to a package, or if not destroyed when the package is emptied, etc., the section provides for appropriate penalties. Why, then, should a court go beyond the terms of the section to declare that to be an offense, by construction, which the statute does not make an offense, especially when the same section makes punishable any failure to destroy the stamp on opening the package, or any affixing of the stamp to a new package?

The question must be resolved in favor of the defendant, although the facts stated indicate a fraudulent purpose on his part.

McCrary, *Circuit Judge*, concurs.

GILMAN, COWDREY *et al.*, Trustees, v. ILLINOIS & MISS.
TELEGRAPH CO.

(*District of Iowa.* October, 1874.)

RAILWAY — MORTGAGE OF ROAD AND INCOME — GARNISHMENT OF RAILROAD COMPANY BY GENERAL CREDITORS. — A general judgment creditor of a railroad company, in a case where the trustees under a prior mortgage of the road and income never obtained possession of the road, or demanded the income, was held entitled by virtue of a garnishment of the officers of the railroad company to the *net* income of the road between the date of a decree of foreclosure and the appointment of a special receiver, the decree of foreclosure being silent as to such income, and the road meanwhile being operated by the company:

In 1857 the Des Moines Valley Railroad Company made to trustees a mortgage, and in 1858, to other trustees, another mortgage to secure a large number of bonds. They were ordinary railway mortgages conveying the road, franchises, rolling stock, etc., together with "all rents, issues, incomes, tolls and profits." In case of default to pay interest or prin-

cipal, the trustees were authorized to take possession "and collect and receive the tolls, incomes, issues and profits," and apply them on the debt secured by the mortgages, and upon the request of one-third of the bondholders to sell railroad and property mortgaged. The trustees never took possession; but default having been made in the payment of interest on both mortgages, the trustees in the second mortgage, in July, 1872, commenced suit to foreclose in one of the state courts, making the railway company, the trustees in the first mortgage, and various judgment and lien creditors of the company, parties defendant, and among others the Illinois and Mississippi Telegraph Company. No receiver was applied for or appointed pending the foreclosure proceedings except as herein-after stated.

On May 31, 1873, a decree of foreclosure was entered by the state court, fixing the priorities of the several parties, and holding that the telegraph company's judgment for \$25,185.76, rendered in *this* court, May 21, 1872, was a lien subject to the mortgages in suit and certain other specified liens. The decree ordered a sale of the mortgaged property by the sheriff on special execution, but as originally entered made *no provision as to the possession or earnings of the road* (which was still in the possession of the railroad company and operated by it) *between the date of the decree and the sale* which the decree ordered. This decree was rendered May 31, 1873, and on the thirteenth day of June, 1873, the telegraph company issued execution on its judgment out of this court, and garnished, under the statute of the state, moneys in the hands of the agents of the railroad company at its various stations received by them from the income and earnings of the road.

On June 20, 1873, the trustees in the first and second mortgages filed *in this court* the present bill in equity against the telegraph company to enjoin the said proceedings upon the execution under its judgment, which bill was, on the twenty-seventh day of June, 1873, amended so as to make the Des Moines Valley Railroad Company also a defendant, and a temporary injunc-

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tion was allowed as prayed. On September 9, 1873, after a sale had been advertised by the sheriff, application was informally made without any petition for rehearing or bill of review to the state court by the trustees under the first mortgage for a modification of the decree of May 31, 1873, and the same was modified in several important particulars; and among other additions to the decree, was one appointing a "special receiver of all the incomes and earnings of the road" between the date of the decree or sheriff's first publication of notice of sale and the sale to be made by him. This was done saving the rights of the telegraph company. The special receiver took possession September 15, 1873. The sale by the sheriff under the decree (which was absolute, and under which the purchasers were let into possession) took place October 17, 1873, and left a large amount of the mortgage bonds unpaid.

Between the date of the decree of May 31, 1873, and September 15, 1873, when the special receiver took possession, the road was operated by the railroad company, and during this period the *net earnings*, after paying operating expenses, were \$27,147.96.

John Fyffe and Gatch, Wright & Runnels, for plaintiff.

Cook, Richman & Bruning, for defendant.

DILLON, *Circuit Judge*.—Among other security taken by the bondholders was a pledge of the income and earnings of the road, with a provision that the railroad company should remain in possession until default in the payment of interest or principal, and upon default by the company in this respect, that the trustees might take possession and collect and receive the earnings of the road. They never took possession or asked for it, nor did they apply for a receiver at any time prior to the ninth day of September, 1873. He took possession September 15. The decree rendered May 31, 1873, made no provision as to the income of the road, or disposition of it. The

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present controversy respects only the right to the *net* income between the date of the decree and the appointment of a special receiver. The telegraph company claims it by virtue of its seizure on execution by garnishment of the agents of the railroad company. The plaintiffs claim it by virtue of the mortgages to them as trustees. To this claim on the part of the plaintiff the defendant relies upon two main grounds of objection: 1st. That the decree of foreclosure merges their rights under their mortgages, and now constitutes the measure of their rights; and as this decree did not give them the earnings in the *interim* between it and the sale, they cannot now fall back upon their mortgage and claim such earnings under it. But if the plaintiffs may still rest upon the mortgages, the defendant contends that until they take possession under them, or apply for and obtain a receiver, the income or earnings may be used by the company or seized by its creditors, especially as the mortgage contains no covenant by the company to apply its net earnings to the payment of the mortgage debt.

If it be conceded that the first position of the telegraph company is not well taken, we would be brought at once to the inquiry, what is the effect of the pledge of the rents and profits, and what must be done to make such pledge effectual?

The cases on the subject in this country are not very numerous, and those in England are controlled by very special statutory provisions.

The supreme court of the United States has decided that under a mortgage by a railway company of its tolls and income, the bondholders or trustees cannot make the railroad company or its assignees accountable therefor, until at least a regular demand has been made upon the company therefor. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 482. So in *Noyes v. Rich*, 52 Maine, 115, it was held that a receiver appointed in a suit to foreclose a railway mortgage could not recover the earnings of the road accruing before his appointment. And see *City of Bath v. Miller*, 57 Maine, 341.

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In the case of the Galveston Railroad, above cited, there was, as here, a mortgage of the tolls and income, with power in the trustees on default to take possession and sell. Mr. Justice BRADLEY, referring to these provisions in the deed of trust, says: "It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect. At all events, until a regular demand was made for the payment of the tolls and income, we do not think, under the language of the deed, that the defendants were bound to account therefor."

There is in the case now before us no proof of any demand of the trustees for the income or earnings upon the railroad company before the foreclosure suit against it, or pending the foreclosure suit, until the ninth day of September, when, upon the application of some of the trustees, a special receiver was appointed, unless *this suit* can be considered such a demand. I do not think it should be so regarded. This suit was not brought to settle rights between the plaintiffs and the railroad company — those had been settled or were to be settled in the state court which had jurisdiction of that controversy.

Since the railroad company, before and pending the foreclosure, was left in possession of the road, and since no attempt to disturb it was made, no receiver applied for or provision made in the decree as to the earnings between the decree and the sale, I am impressed with the belief that the plaintiffs in the foreclosure suit did not intend to disturb the possession of the company, and that no question would have been made as to these earnings or their application if the telegraph company had not levied its execution.

On the whole, I think the bill ought to be dismissed. Judge LOVE agrees in the conclusion that the *net* income was subject to garnishment, but is of opinion that the gross income cannot thus be seized.

Decree accordingly.

Affirmed, 91 U. S. 603.

American Union Telegraph Co. v. Bell Telephone Co.

AMERICAN UNION TELEGRAPH CO. v. BELL TELEPHONE CO.

(Eastern District of Missouri. April, 1880.)

MANDAMUS — JURISDICTION OF THE CIRCUIT COURTS.—The jurisdiction of the circuit courts in *mandamus* proceedings is not enlarged by the act of 1875.

Motion for discharge of order to show cause why writ of *mandamus* should not issue.

Cline, Jamison & Day, for petitioner.

Edmund T. Allen, for respondent.

TREAT, *District Judge*.—To have the jurisdictional question tested, the order to show cause issued in this case; and now, on the motion to discharge said order, the court is to determine whether, by force of the act of 1875, the powers not theretofore existing as to an original proceeding for *mandamus* have been granted. All the decisions prior to that act, it is conceded, denied such jurisdiction in the United States circuit courts; but it is contended that the act of 1875 not only enlarged the jurisdiction as to parties, but also as to the subject matter and forms or modes of proceeding. The language invoked is that said courts "shall have original cognizance, etc., of all suits of a civil nature at common law or in equity."

There still remain on the statute book sections 629 and 716, which are substantially a reproduction of sections 11 and 14 of the judiciary act (1789), unless their restrictions are repealed by the act of 1875. The latter enlarged the jurisdiction as to parties, but used the same language as to the nature of the suits which had prevailed since 1789, viz.: "All suits of a civil nature, at common law or in equity," under which the United States supreme court has uniformly held that, taken in connection with section 14 of the original act—now 716 of the Revised Statutes—the power claimed did not exist. It is held, therefore, that the United States circuit courts have

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not, under the statutes of 1875, any other jurisdiction in *mandamus* proceedings than theretofore existed. The same reasons that caused congress originally to withhold the authority exist more forcibly to-day, growing out of the large multiplication of offices and corporations.

The motion to discharge the order is granted.

If the parties wish to further test the question, a demurrer to the jurisdiction may be interposed and sustained.

BARTLETT, REID & Co. v. TEAH and others.

(*Eastern District of Arkansas.* ———, 1880.)

1. **MORTGAGE—SPECIFIC LIEN—EQUITABLE TITLE OF GRANTOR.**—A mortgage, or deed of trust in the nature of a mortgage, creates a specific lien, and is, in effect, a security for a debt, and not an absolute conveyance of the property. The equitable title remains in the grantor, and may be sold or encumbered by him, or seized and sold by his creditors, subject to the prior lien of the mortgage or deed of trust.
2. **ASSIGNMENT FOR BENEFIT OF CREDITORS—ABSOLUTE TITLE PASSED.** A voluntary assignment of property by a debtor, for the benefit of his creditors, does not operate by way of security for the debts, nor create a lien on the property, but passes the absolute title, legal and equitable, to the assignee, for the purpose of raising a fund to pay debts; and, as against the assignee and those holding under him, the debtor has no estate or interest in the property, legal or equitable, which he can convey or encumber, or which his creditors can seize, or sell, or establish a lien upon, until the purposes of the trust are satisfied.
3. **ASSIGNEE—ATTACHING CREDITORS—REV. ST. OF ARK. § 385.**—Under section 385 of the Revised Statutes of Arkansas, an assignee does not acquire title to the property assigned, as against attaching creditors of the assignor, until he files the inventory and gives the bond required by that section; and, until the inventory is filed and the bond given, the assignee cannot lawfully take possession of the property.
4. **DEED OF ASSIGNMENT IN CONTRAVENTION OF REV. ST. OF ARK. § 387.**—A deed of assignment that directs the assignees to sell the property (a stock of goods) in the ordinary course of trade, at private sale, for twelve months, and that, in terms or by necessary implication, forbids a sale at public auction until after the expiration of that period, is in contravention of section 387 of the Revised Statutes, and renders the deed void.

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The plaintiffs sued out a writ of attachment, and caused it to be levied upon a stock of goods as the property of the defendant Amanda Teah. Edward Hunt and Abram Teah intervened in the suit, and filed their petition, claiming the property attached under an instrument claimed by them to be a mortgage, or deed of trust in the nature of a mortgage. After reciting the names of the creditors, and the amount of their respective debts, it conveys the property, in apt words, absolutely to the assignees in trust, for the purpose of securing numerous creditors named in the full payment of their several debts, and for that purpose the assignees are empowered to take immediate possession of the property, and sell the same at private sale, in the usual course of trade, and with the proceeds pay the creditors mentioned; and, if the debts are not satisfied at the end of twelve months after the date of the assignment, the assignees are directed to sell the property remaining on hand at public auction, upon ten days' notice. The assignees are to account to the assignor for any surplus remaining after satisfying in full the debts of the creditors named. There is no defeasance clause in the instrument. It was duly executed, acknowledged and recorded, and the assignees in possession of the goods under it before the levy of the writ of attachment. It affirmatively appears from the petition that the assignees have not filed an inventory, nor given bond as required by section 385, Gantt's Digest. The plaintiffs in the attachment demurred to the petition.

Wm. Walker, for assignees.

Erb, Summerfield & Erb, for attaching creditors.

CALDWELL, *District Judge*. — The first question to be determined is the character of this instrument.

The interpleader maintains that it is a mortgage, or deed of trust in the nature of a mortgage, and the attaching creditor insists that it is an assignment for the benefit of creditors, and

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that, as such, its validity must be tested by the provisions of the statute of this state relating to such instruments.

A brief consideration of the purposes and legal effect of the several instruments mentioned will disclose to which class this instrument belongs. A mortgage does not invest the mortgagee with an absolute and indefeasible title; the equitable title, called the equity of redemption, remains in the mortgagor. The mortgage is a security for the debt, and creates a *lien* upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust, executed to secure a debt, where the power of sale is placed in a third person. Both are *securities* for a debt; both create *specific liens* on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the *lien* created by the mortgage or deed of trust. Burrill on Assignments, § 6; *Turner v. Watkins*, 31 Ark. 429, 437; Dillon's Monograph on Deeds of Trust, 11 Am. Law Register (N. S. 1863), 648.

An assignment for the benefit of creditors is well defined to be "a transfer by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor." Burrill on Assignment, § 2. The terms of the instrument in this case bring it exactly within this definition, and stamp it as an assignment for the benefit of creditors and not a mortgage, or deed of trust in the nature of a mortgage. Unlike a mortgage or deed of trust, it was not given by way of *security*. There is no defeasance clause giving the grantor the right of redemption; it does not create a lien on the property, but conveys it absolutely for the purpose of raising a fund to pay debts; and, if valid, it passed the absolute title, legal and equitable, to the grantors in the deed, subject to the trust, and placed the same beyond the reach of the debtor, as well as her creditors, until the purposes

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of the trust were satisfied. When the debts were paid the debtor had a right to the surplus, but until that was done she had no legal or equitable interest in the property, or its proceeds, that could be sold or encumbered or seized on attachment or execution by her creditors. *Briggs v. Davis*, 21 N. Y. 577; *Hoffman v. Mackall*, 5 Ohio St. 124; *Crittenden v. Johnson*, 41 Ark. 94; *Pettit v. Johnson*, 15 Ark. 55; *Turner v. Watkins*, 31 Ark. 437; *Wallace v. Krebs*, 87 Pa. St. 263.

Is the instrument valid as an assignment for the benefit of creditors? For a long period in this state there was no statute limiting or regulating the common law rights of a debtor to convey his property to an assignee for the payment of his debts. It is well known that in many cases where debtors resorted to this mode of shielding their property from judicial process, they made choice of an insolvent friend or relation for assignee, who would administer the trust in the interest of the debtor; and not having to file any inventory and appraisement of the property assigned, or give bond for the faithful execution of the trust, the result was that the property was appropriated by the assignee for his own and the debtor's use, and it was rare that creditors received anything from the trust. Under that system it would have been more appropriate to designate the transaction as an assignment for the benefit of the debtor and his assignee, and to defraud creditors, than as an assignment for the benefit of creditors.

Of course, it was open to creditors to invoke the aid of a court of equity to remove such an assignee and appoint some suitable person to execute the trust, but it often happened that before creditors, who usually resided at a distance, could be sufficiently advised, and concert measures for their protection through the court of chancery, that the assignee had placed the property and its proceeds beyond their reach. And where that was not the case, and the creditors succeeded in getting rid of the debtor's assignee and having a receiver appointed, the costs incurred in the litigation that had to be gone through with to attain that end usually consumed the estate.

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To put an end to such fraudulent practices the act of 1859, sections 385, 387, Gantt's Digest, was passed. It was the design of that act to cut up by the roots the evils of the former practice. The legislative intent to accomplish this purpose is not left to implication, but is expressed in plain and unmistakable language. The first section of the act declares that "in all cases in which any person shall make an assignment of any property, whether real, personal, mixed, or choses in action, for the payment of debts, *before* the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall be required to file in the office of the county clerk a full and complete inventory and description of the property, and execute a bond to the state in double the value of the property, with good securities, to be approved by the county judge."

Under this section three things are necessary to a complete and valid assignment: *First*, a deed of assignment; *second*, an inventory of the property filed with the county clerk; and *third*, the execution of an approved bond by the assignee. All these must be done "before" the assignee acquires the legal title to the property; they are conditions precedent, made so by the express language of the statute.

One who by law has no right to the possession of personal property, and no right to sell or in any way manage or control it, has no title to it. This language in the act, *ex vi termini*, imports a want of title, and is legally equivalent to a declaration that, before the title to the property shall vest in the assignee, he shall file the inventory and give the bond required by the act.

The assignee is not required to prepare the inventory, but to "file it in the clerk's office;" he does not make it and cannot do so, because he is denied the possession of the property until the inventory is filed. It is the duty of the debtor making the assignment to prepare the inventory; it is a material, and, under the statute of this state, an indispensable, part of the assignment. There is not a word in the statute counte-

nancing the suggestion that the assignee is required to make the inventory. This would be to reverse the necessary and uniform order of doing business; it is the vendor of goods who makes the invoice and not the vendee.

The assignee, in a voluntary deed of assignment to pay creditors, is not a purchaser for value; he has none of the equities of such a purchaser, and in a court of law he must stand on his naked legal title, which he can only acquire in the mode prescribed by the statute. And what can be more reasonable and just than the requirements that such an assignee shall, for the protection and security of the debtor's creditors, place upon record evidence of the character, quantity and value of the property assigned, and give a sufficient bond to account therefor; and that he shall not be invested with the title to the property until these things are done? And if a debtor desires, by an assignment, to place his property beyond the reach of judicial process, at the suit of his creditors, is it not just and reasonable that he should be required, as a condition precedent to the effectiveness of such an assignment, to see to it that the assignee he himself has chosen files the inventory and gives the bond required by law for the protection of creditors? Such must be his duty under a statute like that in this state, which leaves the property in his possession until the inventory is filed and bond given, otherwise it would be to his interest to select an assignee who either could not or would not give a bond.

It is believed the statute of this state is more peremptory and stringent in its provisions on this subject than the statute of any other state. No other statute has been brought to our attention that in terms prohibits the assignee from taking possession of the property until he files the inventory and gives the bond. In most of the states he may lawfully take possession of the property, and time is given to file the inventory and give bond. This was the law in New York, and the court of appeals of that state held that, if the inventory and bond were not filed within the time required by the statute,

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the assignee, though in possession under the deed of assignment, acquired only an inchoate title, that was void as against an attaching creditor of the assignor. The court say the schedule required by the act to be made by the debtor within twenty days from the date of assignment is a necessary part of a valid assignment, and a prerequisite to vesting the title to the property in the assignee; and that the execution by the assignee of the bond required by the act is also a prerequisite to the acquisition of an absolute title by the assignee, and that until the inventory is filed and bond executed the property may lawfully be seized on attachment at the suit of the debtor's creditors. And the court say further, that "assignors must see, in selecting assignees, that they will not only accept, but that they can and will give the bond required, and assignors must take care to complete the assignment by giving the necessary schedule." *Juliand v. Rathbone*, 39 N. Y. 369. And see *Hardeman v. Bowen*, id. 196; *Britton v. Lorenz*, 45 N. Y. 51.

Confessedly, until the inventory is filed and bond given, the assignee is not entitled to the possession of the property, but the possession remains with the debtor. Now, if the deed of assignment, without more, passes the title and bars creditors from proceeding at law to subject the property to the payment of their debts, the property is placed in a novel predicament: the assignee cannot dispose of it in execution of the trust, nor can it be reached by proceedings against him, because neither the possession, nor rights of possession, nor disposition, is in him; and creditors cannot reach it in the hands of the debtor, for though in his possession, the title is in his assignee, and he only holds it as a kind of bailee or trustee, until it shall please his assignee to file an inventory and give the required bond. This, in effect, is making the debtor his own trustee. Is this state of things to continue at the pleasure of the debtor and his assignee? If not, when and how is it to be terminated?

It is said creditors may resort to equity to enforce the trust. Without inquiring whether a bill would lie for that

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purpose, especially at the suit of a creditor excluded from all benefits under the assignment, it certainly is not their only remedy. They have an undoubted right to pursue their legal remedies, unaffected by an assignment that is incomplete, or in violation of the statute.

Section 387 declares that the "assignee shall be required to sell all the property assigned to him for the payment of debts, at public auction, within one hundred and twenty days after the execution of the bond required by this act, and shall give at least thirty days' notice of the time and place of such sale."

This deed of assignment, in terms or by necessary implication, requires the assignees to sell at private sale, in the usual course of trade, for twelve months, and after the expiration of that period they are authorized to sell at public auction, on ten days' notice. This provision is in direct contravention of the statute, and renders the assignment void.

Demurrer sustained.

On a motion for rehearing, before a full bench, McCrARY, *Circuit Judge*, concurred in the foregoing opinion.

THE UNITED STATES v. STATE NATIONAL BANK OF MINNEAPOLIS.

(*District of Minnesota.* —, 1874.)

1. INTERNAL REVENUE TAX ON BANK DIVIDENDS — ACT OF CONGRESS CONSTRUED.— Under the legislation of congress (16 Stats. at Large, 260), national banks are liable to a penalty for failing to make a return of dividends declared, etc., during the period between July 1 and December 30, 1870.
2. SAME.— Said dividends, etc., are subject to a tax of two and one-half per centum during said period.

W. W. Billson, District Attorney, for the United States.

Lochran, McNair & Gilfillan, for defendant.

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This suit is brought against the defendant to enforce a penalty of one thousand dollars, for failure to make a return of the dividends declared, additions to its surplus fund, and profit and loss accounts. The dividends and additions to the several funds are alleged to be from earnings, income and gains, made during the period of time between July 1, 1870, and December 30, 1870. Repeated demands by the assessor for a list and return thereof, and refusal by the president and cashier of the bank, are alleged.

The defendant interposes a demurrer.

The penalty is claimed under the sixteenth section of the act of congress of July 14, 1870, entitled "An act to reduce internal revenue taxes, and for other purposes" (U. S. Stats. at Large, vol. 16, pp. 260, 261), for a failure to make the return of earnings, income and gains, and payment of the taxes imposed thereon by the fifteenth section of the same act.

Section 15 enacts: "That there shall be levied and collected for and during the year eighteen hundred and seventy-one, a tax of two and one-half per centum upon the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends of earnings, income or gains hereafter declared, by any bank, trust company, savings institution, insurance company, railroad company, canal company, turnpike company, canal navigation company, and stock-water company, whenever and wherever the same shall be payable, and to whatsoever person the same may be due, including non-residents, whether citizens or aliens, and on all undivided profits of any such corporation which have accrued and been earned and added to any surplus, contingent, or other funds; and every such corporation having paid the tax as aforesaid, is hereby authorized to deduct and withhold from any payment on account of interest, coupons and dividends, an amount equal to the tax of two and one-half per centum on the same; and the payment to the United States, as provided by law, of the

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amount of tax so deducted from the interest, coupons and dividends aforesaid, shall discharge the corporation from any liability for that amount of said interest, coupons or dividends, claimed as due to any person, except in cases where said corporations have provided otherwise by an express contract: Provided that the tax upon dividends of insurance companies shall not be deemed due until such dividends are payable either in money or otherwise; and that the money returned by mutual insurance companies to their policy holders, and the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, shall not be considered as dividends; and that when any dividend is made, or interest as aforesaid is paid, which includes any part of the surplus or contingent fund of any corporation which has been assessed and the tax paid thereon, or which includes any part of the dividends, interest or coupons received from other corporations whose officers are authorized by law to withhold a per centum on the same, the amount of tax so paid on that portion of the surplus or contingent fund, and the amount of tax which has been withheld and paid on dividends, interest, or coupons, so received, may be deducted from the tax on such dividend or interest."

Section 16 enacts: "That every person having the care or management of any corporation liable to be taxed under the last preceding section, shall make and render to the assessor or assistant assessor of the district in which such person has his office for conducting the business of such corporation, on or before the tenth day of the month following that in which any dividends or sums of money become due or payable as aforesaid, a true and complete return, in such form as the commissioner of internal revenue may prescribe, of the amount of income and profits and of taxes aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the corporation, under oath, that the same contains a true and complete account of the income and profits and of the taxes as aforesaid. And for any default in the

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making or rendering of such return, with such declaration annexed, the corporation so in default shall forfeit, as a penalty, the sum of \$1,000; and in case of any default in making or rendering said return, or of any default in the payment of the tax as required, or of any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal."

NELSON, *District Judge*. — The seventeenth section of the act of July 14, 1870 (16 Stats. at Large, 261), provided for the tax upon the earnings, income and profits of the defendant during the month of July, 1870, at the rate of five per centum; and the fifteenth section of the same act reduced this tax to two and one-half per centum, and limited its continuance during the remaining portion of the year 1870 and the year 1871. There can be no doubt in our opinion in regard to the effect of the fifteenth section. The language is plain and unmistakable. The defendant's counsel admit that this section imposed the tax at two and one-half per centum for the year 1871, but deny that the language used imposing the tax "on the amount of all dividends of earnings, income, or gains *hereafter declared* by any bank," etc., has the effect of imposing this two and one-half per centum tax upon the dividends declared, or undivided profits added to any funds, after August 1, 1870, and before the expiration of the year.

In our opinion this view is not correct. The word "hereafter" refers to a time after the passage of the act; any other limitation or qualification would render this word, according to the context, meaningless.

The defendant's counsel urge that, inasmuch as the first clause of the section enacts "that there shall be levied and collected for the year 1871, a tax," etc., it excludes the idea that any tax could be levied and collected in the year 1870. Admit that such is the case, and still there is no inconsistency in the subsequent phraseology of the section. A tax could cer-

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tainly be levied and collected in 1871, upon the earnings, income, etc., of 1870. This section fixed the period when the tax ceased, and imposed it upon the earnings, income and profits of certain institutions during the years 1870 and 1871.

In the language of Mr. Justice MILLER in *Stockdale v. Ins. Co.* 19 Internal Revenue Record, 170, when considering the act of 1870: "It repealed several sections of the internal revenue law absolutely. It fixed a period in the future for the cessation of others, and it reduced the income tax in a certain class of cases from five to two and one-half per centum, and provided for its continuance through the years 1870 and 1871, at the end of which all income tax was to cease."

If there was any ambiguity of language used in this section, and we should examine it in the light of all of the surrounding legislation upon the subject of taxation of the earnings, income and gains of banks, and other institutions therein named, there could be no satisfactory reason assigned, or explanation given, why congress, having imposed the taxes up to August 1, 1870, should rescind them for the remaining portion of the year 1870, and renew them during the year 1871.

The complaint states facts sufficient to show a failure to make a list or return, which, if true, would entitle the government to recover the penalty denounced by the act.

The demurrer is overruled with leave to answer in twenty days after notice of this decision or judgment.

DILLON, *Circuit Judge*, concurs.

ORDERED ACCORDINGLY.

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AMERICAN UNION TELEGRAPH CO. v. THE UNION PACIFIC
RAILWAY CO. *et al.*

(District of Nebraska. April, 1880.)

1. CORPORATION — CONTRACT ULTRA VIRES. — The powers of corporations organized under statutes are such, and such only, as those statutes confer, including implied as well as express powers.
2. SAME. — A contract in excess of the powers conferred, or, in case of a *quasi* public corporation like a railroad company, a contract which disables the corporation from performing its duties to the public, is void. Hence a corporation cannot alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority. *Thomas et al. v. West Jersey R. Co.* 101 U. S. 71, followed.
3. SAME — CONTRACTS ULTRA VIRES. — Certain contracts entered into by the Union Pacific Railroad Company, assigning a large part of its franchise, and alienating property which was necessary to the performance of its obligations and duties to the government and to the public, held *ultra vires*.
4. SAME — INJUNCTION. — Although a contract may be *ultra vires*, if it has been executed in whole or in part, neither party to it will be permitted to rescind it of his own motion, and to recover, without process of law, and by force, the consideration paid or property acquired under the contract; and in such case a corporation that has received a large consideration for a contract *ultra vires* for the sale of a telegraph franchise, will be restrained from resuming possession of said franchise and the property connected therewith, until an accounting and settlement can be had between the parties.

• Motion for injunction.

The facts are stated in the opinion.

Williams & Thompson and *C. Beckwith*, for complainant, insisted:

First. That the defendant railroad company, under the circumstances of this case, is not at liberty to question the validity of the contract of transfer, and in no event without repayment of the consideration which it received.

Second. That the contract of transfer was valid and effect-

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ual to give the complainant the rights which it purported to confer.

Third. That partial failure of consideration by the discontinuance of offices off the line in question, if true, would not justify a rescission.

Fourth. That for the purposes of this motion the complainant's enjoyment and occupation of the rights of exercising its franchises are sufficient to entitle it to the relief which it seeks; and,

Fifth. That an injunction in substantially the terms prayed for in the petition is the proper and only remedy open to the complainant.

In support of the first proposition, and generally upon the question of the enforcement of contracts entered into by corporations, and which are *ultra vires*, they cited *Bradley v. Ballard*, 55 Ill. 417; Field on Corp. secs. 266, 273, and cases cited; *Bissell v. Railroad*, 22 N. Y. 258; *Curtis v. Leavitt*, 15 N. Y. 9; *Parish v. Wheeler*, 23 N. Y. 494; *Whitney Arms Co. v. Barlow*, 63 N. Y. 68; *Thompson v. Lambert*, 44 Iowa, 239; *Hayes v. Gallion Gas Light Co.* 29 Ohio St. 338; *Township v. Talcott*, 19 Wall. 678, 679, and cases cited; *Railway Co. v. McCarthy*, 96 U. S. 267; Sedgw. on Const. and Stat. Law, 73, and cases cited; *Anglo-Austrian Ass. Co. v. British Co.* 3 Gif. 521; *Railroad Co. v. Howard*, 7 Wall. 393; *De Groff v. American*, etc. 21 N. Y. 127; *Union Water Co. v. Murphy* Co. 22 Cal. 620; *Eastern Counties R. R. v. Hawkes*, 5 H. L. 331; *Oil Creek R. R. v. Penn. Trans. Co.* 83 Pa. St. 160; *Hamilton, etc. Co. v. C. H. & D. R. R.* 29 Ohio St. 341; *Board, etc. Co. v. R. R.* 47 Ind. 407; *N. W. Packet Co. v. Shaw*, 37 Wis. 655; *R. R. v. R. R.* 34 Vt. 1; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *National Bank v. Matthews*, 98 U. S. 621; *Silver Lake Bank v. North*, 4 J. O. R. 307; *McCutcheon v. Steamboat Co.* 13 Pa. 13; *Palmer v. Lawrence*, 3 Sandf. 170; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *Ex parte Peru Iron Co.* 7 Cow. 540; *White v.*

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Howard, 38 Conn. 342; *Thompson v. Waters*, 25 Mich. 214; *State v. B. C. & M. R. R.* 25 Vt. 433.

Upon the second proposition, they cited section 1 of original Pacific Railroad charter; section 15 of the amendment of said charter of 1864; the amendment of said charter of 1874; 18 Statutes, 111; sec. 94, chap. 11, Gen. Stat. Nebraska; *Hall v. Sullivan R. R. Co.* 21 L. R. 138; *Pullan v. R. R. Co.* 4 Biss. 35; *Dimpfel v. R. R. Co.*; The Reporter, Nov. 19, 1879; *Thomas v. West Jersey R. R. Co.* Sup. Ct. U. S. Oct. Term, 1879; *Attorney General v. Railroad*, 3 McN. & G. 453; *Commonwealth v. Fitchburg R. R.* 12 Gray, 180; *Simpson v. Hotel Co.* 8 H. L. C. 712; *Brown v. Winnisimmet Co.* 11 Allen, 344; *People v. Manhattan Co.* 9 Wend. 351; *Penn. R. R. v. Sly*, 65 Pa. St. 205; *York v. Winans*, 17 Howard, 350.

Upon the third proposition, they cited *Western Bank of Scotland v. Addie*, L. R. 1 Scotch Appeals, 145; 2 Parsons on Contracts, 833; *Webb v. Stone*, 24 N. H. 288; *Patton v. Stewart*, 24 Ind. 332; *Johnson v. Jones*, 13 Sm. & M. 580; *Carroll v. Rice*, Walker Ch. (Mich.) 374; *Morgan v. R. R. Co.* 2 Woods, 244; *Behn v. Burgess*, 3 B. & S. 751; *Betts v. Perrin*, 14 Wend. 219; *Weinz v. Hafner*, 78 Ill. 27; *Davis v. Tarwater*, 15 Ark. 286; *Cunningham v. Fithian*, 2 Gilm. 650; *Smallcombe's Case*, L. R. 3 Eq. 769; *Brotherhood's Case*, 31 Beav. 365.

Upon the fourth proposition, they cited *Eckelkamp v. Schroeder*, 45 Mo. 505; *Livingston v. Van Ingen*, 9 Johns. 507; *Lansing v. Steamboat Co.* 7 Johns. Ch. 162; *Varick v. New York*, 4 Johns. Ch. 53; *Dudley v. Trustees*, 12 B. Mon. 610; *Farmers v. Reno*, 53 Pa. St. 224; *Lowndes v. Beetle*, 33 Law Jour. Ch. 456; *Robinson v. Byron*, 1 Bro. Ch. Cas. 588; *Harrison v. Jones*, 1 O. & P. 299; *Toler v. Slater*, L. R. 3 Q. B. 42; *Demedina v. Polson*, Holt N. P. C. 47; *Dunn v. Fernside*, 1 Wils. 176; *Rigg v. Bell*, 5 T. R. 471.

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Upon the fifth proposition, they cited *Holmes v. R. R. Co.* 3 K. & J. 675; *Jones v. North*, L. R. 19 Eq. 426; *Mayor of London v. Hedger*, 18 Ves. 355; *Vincent v. R. R. Co.* 49 Ill. 33; *Hamilton v. Dunsford*, 6 Irish Ch. 412; High on Injunctions, sec. 333; *Mining Co. v. Mining Co.* 1 Sawyer, 470; *Beadel v. Perry*, 3 Eq. Cas. 465; *Pratt v. Brett*, 6 Madd. 62; *Pulteney v. Shelton*, 5 Ves. 260 n; *Walton v. Johnson*, 15 Simon, 352; Kerr on Injunctions, 418.

John F. Dillon, *Sidney Bartlett*, *J. P. Usher* and *A. J. Poppleton*, for respondents.

These contracts were illegal and void.

The Atlantic and Pacific Company had no corporate competency to make them.

I. Its charter gave it no corporate power to build and operate a telegraph line in Nebraska, Wyoming or Utah.

II. This lack of power was aided in no way by state statutes.

III. Act of July 24, 1866, conferred no corporate power, contrary to the policy of the government, conferred by general act. Language does not import corporate authority, only permission to occupy government routes and property. *Pensacola v. Telegraph Co.* C. L. N. 27 Apr. 78, 281. The Union Pacific Company had no power to make it. The act of July 1, 1862, creating the corporation, defines its power in section 1. After granting the usual powers to sue, be sued, and have the corporate seal, it continues: "And the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with the appurtenances, * * * and is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act, as herein set forth." These powers are granted for a public purpose, in execution of the powers of the government. The corporation is a mere agent of the government. *Penniston, Treas. v. U. P. R. R. Co.* 18 Wall. 31; *U. P. R. R. Co.*

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v. *U. S.* 91 U. S. 72. The obligation of the company to execute the powers given has never been denied, and is assumed as settled by the supreme court. *U. P. R. R. Co. v. Hall ex rel.* 91 U. S. 343. This obligation was considered so important that congress has enforced it by stringent enactments and severe penalties. Act of July 1, 1862, sec. 12; act of July 2, 1864, sec. 15; act of June 20, 1874; act of 1862, sec. 19. The contract was never ratified by the stockholders, nor was it ever accepted or recognized by the government or any department thereof, but, on the contrary, has been expressly disavowed. Railroads are public corporations. They are created to answer a public object, and are bound to the state for the performance of their public duty. They can do no act which would amount to a renunciation of their duty to the public, or which would directly and necessarily disable them from performing it. They cannot convey away their franchises and corporate rights, nor, perhaps, the track and right of way which they take and hold for the necessary use of their road. *Pierce v. Query*, 32 N. H. 484. This is doubly true of the Union Pacific, as before shown. A corporation created for the very purpose of constructing, owning and operating a railroad for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise of the company or of the subordinate franchise to manage and carry on its corporate business, without which its franchise to be a corporation, can have little more than a nominal existence. *Richardson v. Sibley*, 11 Allen, 65; *Commonwealth v. Smith*, 10 Allen, 448; *Coe v. R. R.* 10 Ohio St. 372; *Canal Co. v. Boubam*, 9 and 10 Pa. St. 27, 85; *Board of Commissioners v. La Fayette R. R. Co.* 50 Ind. 85; *Bissell v. R. R. Co.* 22 N. Y. 299. A corporation, unless specifically authorized by its charter or by statute, cannot convey away, assign or lease any franchise or property granted it for public purposes. 32 N. H. 484; 44 N. H. 127; 25 Ill. 353; 42 Ill. 477; 7 Gray, 398; 10 Allen, 448; 11 Allen, 65; 13 Allen, 422; 14 Allen, 381; 118 Mass.

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543; 65 N. Y. 43; 15 Ohio St. 21; 40 Mo. 140; 33 Me. 132; 61 Ill. 422; 12 Pet. 102; 7 C. E. Green, 130; 9 C. E. Green, 464; 50 Ind. 85; 68 Me. 43; 4 Biss. 35; 21 Han. 441; *Thomas v. S. N. J. R. Co.* U. S. C.; *Great North. R. R. v. Eastern Counties R. R.* 6 Hare, 106; *Beavan v. Reeford*, 9 Eng. L. & Eq. 106; *S. J. B. & D. Co. v. N. R. W. Co.* 19 Eng. L. & Eq. 513. Parties dealing with a corporation created by law for public purposes must take notice of the extent of its corporate powers, and it is not estopped from making the defense of *ultra vires*. *Pearce v. Madison*, 21 How. 441; *Monument Bank v. Glass Works*, 101 Mass. 38; *Commissioners v. La Fayette R. R. Co.* 8 A. R. R. 355; *O. & M. R. R. Co. v. J. C.* 5 An. L. R. 741; *Downey v. Mt. Washington Co.* 40 N. H. 230; *Andrews v. Ins. Co.* 37 Me. 256; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 45. A court of equity will not lend its aid to enforce the performance of a contract which is contrary to public policy. Willard's Equity, 268; *Pratt v. Adams*, 7 Paige, 639; *Hudson v. Johnson*, 45 Cal. 24; *Daniel v. Mayer*, 40 Cal. 170. That corporate acts, expressly or by necessary implication prohibited by charter, are illegal, *ultra vires* and void. Such, it is submitted, is the ultimate result of the legal adjudications in this country and in England. *Taylor v. C. & Mid. R. R. Co.* L. R. 2 Exch. 356, 384; *S. N. E. R. R. Co. v. Stewart*, 3 McQueen, 382, 415. That neither the doctrines of estoppel or of ratification will bar a corporation from resisting the enforcement of its contracts when expressly, or by necessary implication, such contracts are prohibited. *Asbury R'y v. Riche*, L. R. 7 H. of L. 653, 673; *Downey v. Mt. Washington Co.* 40 N. H. 230. "It is not unfrequently very difficult to determine whether a certain agreement is nothing more than traffic arrangement, or whether it amounts to a transfer of such powers. Commercial corporations, it need scarcely be repeated, may make all such *bona fide* arrangements as will tend to their own emolument, and at the same time are not contrary to public policy. They may covenant to use or not to use their powers

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in certain modes and under certain restrictions; *but the line must be drawn somewhere, and it is drawn where such covenants expressly or by implication amount to an abandonment or transfer of powers.*" Brice, English ed. 1877, p. 523; Brice, American ed. 1875, pp. 305, 308, 339; *Great North. R. R. v. Eastern Counties R. R.* 9 Hare, 306; *Winch v. Birkenhead R. R.* 5 De G. & Sm. 562, 578; *Beman v. Rufford*, 1 Simons N. S. 550-569; *London B. & S. C. R. R. v. London & S. W. R. R.* 4 De G. & J. 362, 389; *Black v. Delaware Co.* 7 C. E. Green, 130, 390; 9 C. E. Green, 455, 465; *Hays v. O. & F. R. R.* 61 Ill. 422, 423; *Conro v. Port Henry*, 12 Barb. 27, 63.

McCABY, *Circuit Judge*.—By act of congress, approved July 1, 1862, and acts amendatory thereof, the Union Pacific Railroad Company was created a corporation with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances," from the Missouri river, through Nebraska and Wyoming, to a junction with the Central Pacific Railroad in Utah. Under this authority the said railroad company built, and early in 1869 completed, its railroad and telegraph over said route. The plaintiff is a corporation organized under the laws of the state of New York.

On the first day of September, 1866, the plaintiff and said Union Pacific Railroad Company entered into a contract, whereby, among other things, the railroad company agreed to demise and lease to plaintiff "all its telegraph lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraphic business; to have and to hold for and during the whole term of the charter of the party of the first part [the railroad company] and any renewals thereof, subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that the plaintiff would faithfully

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and fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States."

On the twentieth day of December, 1871, a supplemental agreement was entered into between said parties, by which certain changes were made in the original contract. Among other things, it was provided in said contracts that the railroad company should receive from plaintiff, in consideration for the same, 17,800 shares of the capital stock of the plaintiff corporation (the Atlantic & Pacific Telegraph Company), which stock the railroad company received and applied to its own use. Said contracts were duly performed on both sides until the twenty-seventh day of February last, when the railroad company assumed, of its own motion, to rescind the same, and to resume possession and control of the property; for which purpose its agents cut the wires running from the general offices of plaintiff, for commercial business, at Omaha, and severed said offices from the main line. It is charged in the bill that this was done for the purpose of giving the business of said line at Omaha, and all the advantages thereof, to the defendant, the American Union Telegraph Company, a competitor and rival of plaintiff in the business of telegraphing.

The Union Pacific Railroad Company, by consolidation with another company, has become the Union Pacific Railway Company, by which name it is sued.

The prayer of the bill is, among other things, for an injunction to restrain the defendants from disregarding the two contracts above mentioned, and from interfering with the property covered thereby, except as in said contracts provided, and from preventing the plaintiff from reconnecting the wires so as to restore them to their original condition before the same were cut. On the first of March it was ordered that the application for injunction be heard before me, at chambers at St. Louis, on the sixth of April, 1880, and in the meantime a preliminary injunction was allowed.

The defendants have answered fully, and numerous affida-

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vits have been filed. Upon the record thus presented counsel have been fully heard, both orally and by printed briefs.

The Union Pacific Railway Company, defendants, admit the cutting of the wires as charged, as well as their purpose to disregard the contracts, and retake the telegraph lines and property, and in justification allege that said contracts were beyond the power of the company to make, contrary to public policy, and in violation of the acts of congress chartering the Union Pacific Railroad Company, and that they are therefore void. The question of the validity of these contracts is the first to be considered.

1. The rules by which this question is to be determined are now well settled, at least in the federal courts. They have been clearly stated by the supreme court in the recent case of *Thomas et al. v. The West Jersey R. Co.* 101 U. S. 71. From the opinion in that case, delivered by Mr. Justice MILLER, I make the following extracts, as laying down the law by which I must be guided:

“ We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of a corporation organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others. * * *

“ There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

“ That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the

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public grant, any contract which disables the corporation from performing those functions — which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes — is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice CAMPBELL, in the case of *The York & Maryland Line Railroad Co. v. Winans*, 17 Howard, 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that state. The stock in it was taken by a Maryland corporation, called the Baltimore & Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock.

“In reference to this state of things, and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error Winans, this court said: ‘This conclusion [argument] implies that the duties imposed upon the plaintiff [in error] by the charter are fulfilled by the construction of the road, and that, by alienating its right to use and its power of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. *Beman v. Rufford*, 1 Simon N. S. 550; *Winch v. B. & L. R. Co.* 13 Law and Equity, 506.’

“And in the case of *Black v. Delaware & Raritan Canal Co.* 7 C. E. Green, N. J. Eq. 390, Chancellor ZABRISKIE says:

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‘It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority.’ For this he cites some ten or twelve decided cases in England and this country.” * * *

The case in which these propositions of law were announced was this: A New Jersey railroad corporation, without express authority, undertook to lease to another company for twenty years its railroad, with all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls. The contract or lease was confirmed by a vote of the stockholders. The lessor was authorized to cancel the lease upon giving three months’ notice, but in that event was to be liable to pay the damages incurred by the other party by reason of such action. Under this provision the railroad company ended the contract, and resumed possession of the leased road. The suit was by the lessee for the damages provided for, and it was held that no recovery could be had because the contract was *ultra vires*. It remains to apply these principles to the case in hand.

2. It is certain that the contracts in question amounted to a lease, or alienation, by the Union Pacific Railroad Company, of property which was necessary to the performance of its obligations and duties to the government, and to the public.

In my judgment the act of July 1, 1862, and its amendments, must be construed as chartering the Union Pacific Railroad Company, and devolving upon it, individually and personally, the power and duty of constructing, operating and maintaining a line of telegraph, as well as a railroad. This is made manifest by the consideration that the government endowed the corporation with large grants of land and bonds, to aid in the construction of these lines, and imposed upon the company the duty of reimbursing the government from the earnings of the road and telegraph line. Section 6, act of 1862. It is also clear from the language of the first section of said act, which empowers the corporation “to lay

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out, locate, construct, furnish, *maintain and enjoy* a continuous railroad and telegraph, with the appurtenances," that the power conferred was personal, and carried with it a duty and an obligation which could not be transferred.

The very same language which authorizes the construction and operation of the telegraph line also authorizes the construction and operation of the railroad, and the property in the one is as necessary to the performance of the public duties of the corporation as that in the other. The charter of the company, with the amendments, considered as a whole, was manifestly intended to create a corporation which should be personally amenable to the government, in the exercise of the powers conferred, and which should in a *quasi* public capacity perform the duties imposed, and render an account of its earnings.

The purpose was not to authorize the construction of a line either of railroad or telegraph to be thereafter sold, leased or transferred to other parties, leaving the government to the chances of securing from or through the lessee or vendee its proportion of the earnings. This is made still more clear by the provisions of the act of June 20, 1874, amending the charter, which imposes upon the company and its officers and agents penalties for a failure to operate or use said railroad or telegraph, *so far as the public and the government are concerned*, as one continuous line, and which gives a right of action to any party aggrieved, "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with this act or the acts to which this is amendatory."

I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating and maintaining a line of telegraph for commercial and other purposes, and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1866, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration

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for these contracts is declared to be "the demise of their telegraph lines, property and good will, and of the rights and privileges, in the manner hereinafter specified," etc.; and the property demised by the railroad company is "all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business." The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimated, I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration, and for a great public purpose, had undertaken to perform. It certainly could not divest itself of these powers and duties, and devolve them upon the plaintiff, without express authority from congress.

3. But if the contracts in question are not *ultra vires*, by reason of the transfer of property necessary to the performance by the railroad company of its public duties, they are so because they attempt to transfer certain franchises of the said company. The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by congress upon the railroad company, as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that this feature is alone sufficient to render them in excess of the corporate power of the company.

4. This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices and property, without first returning the consideration received therefor

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from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law, a contract *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard*, 55 Ill. 417.

And in the case of *Thomas v. R. Co.* (supreme court U. S.), already quoted from at length, Mr. Justice MILLER, upon this

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point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler*, 22 N. Y. 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and *each party has received what he was entitled to by its terms.*"

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff

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are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder*, 45 Mo. 505; *Varick v. New York*, 4 Johns. Ch. 53; *Dudley v. Trustees*, 12 B. Mon. 610; *Farmers v. Reno*, 53 Pa. St. 224; *Sunsing v. Steamboat Co.* 7 Johns. Ch. 162.

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified

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as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

STATE NATIONAL BANK OF MINNEAPOLIS v. H. G. O. MORRISON.

(*District of Minnesota.* December, 1874.)

TAXATION OF INCOME OF NATIONAL BANKS—DISTRAINT BY COLLECTOR.—

The act of congress of July 14, 1870 (16 Stats. at Large, 260, 261, secs. 15, 17), imposes taxes upon the income and profits of national banks for 1870; and if the bank refuses to pay such taxes duly assessed upon notice and demand, the collector or deputy collector may, as authorized by act of congress (16 Stats. at Large, pp. 101, 106), distrain therefor.

Lochran, McNair & Gilfillan, for plaintiff.

W. B. Bellson, District Attorney, for defendant.

NELSON, *District Judge*.—This is an action brought against the defendant, a deputy collector of internal revenue, in 1871, to recover the amount seized by him in satisfaction of taxes accrued upon the increase, earnings and profits of the plaintiff for the year 1870. The stipulation of facts submitted to the court trying the case without a jury by virtue of the consent of parties properly entered into, and filed of record, shows that the amount of income, earnings and profits of the plaintiff for the first and second six months of the year 1870, was obtained by an examination of the cashier of the plaintiff under a summons issued by the assessor, and that the tax, with fifty per cent. penalty, amounted to the principal sum claimed in the complaint.

That the plaintiff refused to render any list or return of the amount of its earnings, income and profits, either as dividends

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due and payable, or undistributed sums in excess of dividends added to its surplus, or profits of any sort, for the year 1870; and that after the examination and disclosure of the cashier, the assessor returned to the collector the amount of the plaintiff's earnings for the year 1870, and the tax at the rate of five per cent. upon all earnings, income and profits for the time embraced between January 1, 1870, and June 30, 1870, and at the rate of two and one-half per cent. upon all income, earnings and profits for the time embraced between July 1, 1870, and December 31, 1870; that the collector demanded payment of the taxes assessed against the plaintiff, which was refused, and on March 18, 1872, a warrant was issued by the collector of internal revenue for the second district of Minnesota, to the defendant, the deputy collector, commanding him to distrain upon the goods and chattels, and effects of the plaintiff, the amount of the tax and penalty.

That the defendant was threatening to distrain, and was proceeding so to do, when the plaintiff by its cashier placed the amount of the tax and penalty claimed upon the counter of the plaintiff's bank, before the defendant, but protested against the defendant's taking it, claiming that the tax and penalties were illegal, and notified the defendant that suit would be brought against him for the amount. The defendant took the money, and this suit was commenced in the district court of the state for the county of Hennepin, and removed to the circuit court of the United States under the provisions of the act of congress.

The defendant is entitled to judgment upon the undisputed facts in the case. The fifteenth and seventeenth sections of the act of congress of July 14, 1870 (16 Stats. at Large, 260, 261), imposed taxes upon the earnings, income and profits of the plaintiff for the year 1870. These taxes the plaintiff refused to pay after due notice and demand, and the collector very properly, under the authority vested in him by the act of congress (14 Stats. at Large, 101, 106), proceeded to distrain for the same, when they were paid under protest. The defend-

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ant, as a deputy collector duly appointed, was authorized to execute the warrant addressed to him, and to receive the amount of the taxes.

Judgment will be entered in favor of the defendant, with costs.

DILLON, *Circuit Judge*, concurs.

JUDGMENT ACCORDINGLY.

BEALS v. NEDDO.

(*District of Kansas. February, 1890.*)

1. MORTGAGE—DURESS—ASSIGNEE WITHOUT NOTICE.—Duress is not available, as a defense upon the foreclosure of a mortgage, where the note and mortgage were purchased before maturity, for value and without notice.
2. NEGOTIABLE PAPER—MORTGAGE—RIGHTS OF ASSIGNEE.—A *bona fide* assignee of a negotiable promissory note who takes the same together with a mortgage securing it before maturity, takes the mortgage as well as the note free of equities.

In equity.

Peck, Ryan & Johnson, for plaintiff.

Danthill & McFarland and *Martin & Milehan*, for defendants.

FOSTER, *District Judge*.—The plaintiff, Charles L. Beals, filed his bill in equity against the defendants, A. P. Neddo and Louisa Neddo, his wife, for a decree of foreclosure of a certain mortgage made by said defendants, on February 1, 1876, on one hundred and sixty acres of land in Shawnee county, the same then and now being the homestead of defendants, which mortgage was made to J. H. Fairbanks to secure a negotiable promissory note, for the sum of \$1,500, bearing even date therewith, and payable three years after date. Before the maturity of said note, and on March 27, 1877, the said Fairbanks indorsed said note and assigned said mortgage

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for a valuable consideration to this plaintiff, who had no notice of any infirmities in said papers, or of any equities against the same.

Louisa Neddo sets up in her answer to plaintiff's bill that she was induced to sign said mortgage, as also the note, under threats of personal violence from her husband, said A. P. Neddo; and that by reason of said duress she never gave her voluntary consent to said contract, and that the said mortgage is null and void. The evidence tends to show that on the day of the execution of the paper by Mrs. Neddo, her husband threatened that if she did not sign said mortgage he would cut her throat; that at the same time he made the threat he had in his hand a large pocket knife, and the threats were made in the presence of a grown son and daughter of Mrs. Neddo; that shortly afterwards, in a few minutes, the notary came into the room with the papers, and Mrs. Neddo signed and acknowledged the same in his presence; that there was nothing in her appearance or manner to excite the suspicion of the notary, or cause him to think she was acting under duress or excitement; that the money was borrowed and used mainly to pay off a prior mortgage on said homestead given by defendants.

The constitution of the state (section 9, art. 15) and statute (Gen. St. 473, § 1) provide that the homestead shall not be alienated without the joint consent of husband and wife. The constitutional and statutory provision makes the consent of both husband and wife necessary to the validity of the conveyance, and if the consent of either is wanting, the deed or mortgage is illegal *in toto*, and gives no title or lien whatever on the premises. In this respect it seems to change the common law rule, which would only invalidate the instrument so far as the party signing under duress was concerned, and it results that the husband is equally benefited with the wife under this defense, if it prevails, although he is the only party in fault.

If the constitution and statute are susceptible of construc-

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tion permitting such defense, and the supreme court of this state appear to so hold in *Anderson v. Anderson*, 9 Kas. 112, and *Helm v. Helm*, 11 Kas. 19, it is probably predicated upon the ground that the husband is the agent of the grantee in procuring the signature of the wife to the conveyance, and is bound by his acts. *Bank v. Copeland*, 18 Md. 305. In any event, it is a defense which defendants, for the purpose of saving their homestead, have a great inducement to make, and once made, a grantee, however innocent and however *bona fide* he has acted, is very much at a disadvantage.

The wife has, and in justice ought to have, the right to protect her home against an improvident husband; but she should assert her right, so far as possible, in a manner not to deceive and defraud parties purchasing or loaning money on the homestead in good faith. Of what occurs in the privacy of the family circle he can know but little or nothing. The wife signs the paper in the presence of the notary, and acknowledges the execution to be her voluntary act, and makes no sign of dissatisfaction. The grantee pays the purchase money, or makes the loan, entirely unconscious of any defect in the conveyance, and after the lapse of years the wife asserts her rights to annul the contract. It is a defense which, under many circumstances, does not present equities superior to those of the grantee. It opens wide the door for collusion between husband and wife to defraud the unsuspecting purchasers; and courts of equity in any case, before declaring such a conveyance void, ought to require the wife to make a clear and plain showing of fraud or duress, and that she is not guilty of collusion, laches, or fault on her part.

Whether the evidence for the defendants in this case makes such a showing I need not discuss, for it is settled by the supreme court of the United States that this defense is not available against the purchaser of the note and mortgage before maturity, for value, and without notice.

The doctrine is old and indisputable that the holder of negotiable paper, before maturity and without notice, takes it

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clear of equities between the original parties, and neither fraud nor duress would invalidate it in his hands. See *Clarke v. Pease*, 41 N. H. 425, where this matter is fully discussed and authorities cited; also, *Hogan v. Moore*, 48 Ga. 162. So, also, is the doctrine that a purchaser, by deed of real estate, without notice, may rely upon the record, and will take the title free of equities between the original parties. *Boone v. Chiles*, 10 Pet. 210; *Deputy v. Stapleford*, 19 Cal. 305; 1 Story's Eq. Jur. 64, 434, 436. The question whether the purchaser in good faith of a promissory note before maturity, who takes an assignment of a mortgage securing the same, takes the security as the note free of equities, is one upon which there is some conflict among the decided cases, but the great weight of authority is to the affirmative. It is sufficient for this court that the supreme court of the United States has so held. The security is but an accessory to the debt, and follows the note, and takes the same character. *Carpenter v. Logan*, 16 Wall. 271, 275; *Sawyer v. Pickett*, 19 Wall. 147; 1 Jones on Mort. § 834, and cases cited.

It follows that the plaintiff is entitled to his decree as prayed for in his bill.

Belt v. CRITTENDEN and others.

(District of Minnesota. February, 1880.)

1. PATENT — WANT OF NOVELTY — CORRUGATED IRON APPLIED TO THE ROOF OR SIDES OF A BUILDING. — If the ordinary form of corrugated iron, when applied to the roof or sides of a building, does not give sufficient air spaces, there is no novelty in making them larger, and diminishing the surface of iron at the point where it is nailed to the woodwork, although the objection may be thereby remedied.
2. SAME — SAME — THICKNESS OF IRON — NAIL HOLES — FORMATION OF JOINTS. — There is no novelty in the fact that the iron, at the point of contact with the wood, is double in thickness, or that the nail holes at the joints may be made elongated in order not to interfere with the nails in case of expansion or contraction, lengthwise, of the corrugations; nor in the manner of forming the joints connecting the several sections of sheathing.

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Suit in equity on final hearing upon pleadings and proof.

Homer C. Eller, for complainant.

Henry J. Horn and *Harvey Officer*, for defendants.

NELSON, *District Judge*. — This suit is brought to recover damages for the infringement of letters patent No. 177,386, granted to the complainant and F. E. Perkins May 30, 1876, and an injunction is prayed. The interest of Perkins was assigned to the complainant May 22, 1878.

The patent was granted "for an improvement in metallic coverings for buildings." The specification says: "Our invention consists in a novel construction of a metallic sheathing for buildings, and similar structures, and is designed, more especially, to render the same fire-proof, although it is of great value as a protection against rain and snow. In the drawing, figure 1 represents a building with our improved sheathing applied to a portion of it; figure 2, a view showing the manner of making the joints; figures 3, 4 and 5, sectional views showing different forms of our improved device. Great inconvenience has heretofore been experienced in applying metal sheathing to buildings, bridges, and similar structures, owing to the fact that the expansion and contraction of the metal, cause the nails to work out, and the metal to draw apart or wrinkle. The shrinkage and swelling of the wood to which the metal is nailed also tends to produce the same result, while the metal, coming against the wood, forms but little protection against fire. In addition to these difficulties, rain or snow, and even fire or flames, often find their way in at the joints as they are at present constructed.

"In order to obviate these difficulties, and produce a sheathing which shall be proof against both water and fire, we make our sheathing of sheet metal, and provide each section with one or more corrugations, as shown in figures 1, 3 and 5; or it may be made in the form shown in figure 4, in which case

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the metal is turned directly backward at each side, at a right angle to the face of the metal, and a flange then turned outward on each side, parallel to the face of the sheathing. It will be observed that in each case a space is left between the metal and the boards to which it is secured, which space is, of course, filled with air. It will also be seen that only a very small surface of the metal comes in contact with the wood, and that, as the joints are formed by lapping the flange of one section over that of the adjoining section, there will in every case be a double thickness of metal at those points at which the metal and the wood do come in contact. The joints between sections, falling one below the other, are formed as shown in figure 2, in which the sections each have the metal turned backward upon themselves, and the flanges thus formed are hooked or locked into each other, and hammered down to make a close joint. As the lower edge of the section is always turned inward towards the building in making the flange, as shown in figure 2, it will be seen that it is impossible for the water to beat into or through this joint, for the reason that the face of the sheathing comes below the joint, and thus protects it; and it will also be impossible for fire to find its way into the joint, because of its being so close. It would even be impossible for it to find its way through the same when made comparatively open or loose, on account of the circuitous passage which it would be obliged to make. The manner of forming the joints at the ends of the different rows or sections of sheathing is shown in figure 1, in which A represents the boarding, and B the metal. As there shown the upper end is slit at the center of the corrugations, and the two parts drawn in and lapped one over the other, as shown, thus forming a beveled surface and a good joint.

“It will be readily seen that this construction will form an excellent protection against fire and water; and the expansion and contraction of the metal, and the shrinkage and swelling of the wood, are provided against by the corrugations in the metal, which will allow it to take up or give out, by reason of

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its elasticity, enough to entirely compensate for these difficulties. It is obvious that instead of running the sections up vertically they may be placed horizontally, that being especially convenient and desirable where the corrugations are made of the form shown in figure 5, which, when placed in a horizontal position, would present the appearance of clapboards. It is also apparent that the joints, which are here represented as simply lapped and nailed through, may be made as shown in figure 2 if desired. This construction, as before stated, forms a very efficient protection against fire and water, and compensates for expansion and contraction of metal, and for shrinkage and swelling of wood, and presents, withal, a very neat and pleasing appearance. If desired, the nail holes at the joints may be made elongated in order not to interfere with the nails in case of the expansion or contraction, lengthwise, of the corrugations.

"This invention is applicable to wooden structures of any kind, and we propose to use it on bridges, cars, and the like. We are aware that buildings have been made in which the walls, both inside and out, were composed of corrugated sheet metal, secured to metal bars and wooden frames, and we do not claim such."

The claim is "a metallic covering for wooden structures composed of the metallic sheets, B, applied to the surface of the structure, in the manner shown, whereby an air space is left between the metal sheets and the wall or structure at all points except the edges of the sheets, substantially as and for the purpose set forth."

The defendants rely, among other defenses, on want of novelty, and, in my view of the case, it will not be necessary to consider any other defense.

In the drawings accompanying the letters patent are three different shaped metallic sheathings, showing as many different corrugations, or air spaces, and the defendants submit exhibits and designs of corrugated iron sheets which had been in use long anterior to the complainant's patent. The only differ-

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ence between the form of the complainant's drawings and exhibits and these, is that in the former the iron is so shaped or corrugated that the spaces between the wood-work and the iron are larger, and at the point where the sheathing is nailed only a small surface of iron comes in contact with the wood, and, as the air chamber is larger, the shape of the complainant's sheathing is, perhaps, a better protection against fire, and a more serviceable covering. But any person has the right to increase or diminish the size of corrugations or wrinkles in iron sheathing. There is no novelty in doing this. If the ordinary form of corrugated iron, when applied to the roof or sides of a building, does not give sufficient air spaces, there is nothing new in the idea of making them larger, and diminishing the surface of iron at the point where it is nailed to the wood-work, although it might remedy the objection. Neither discovery nor invention was necessary to do this. The defendants' witnesses, upon the defense of want of novelty, refer to several forms of corrugated iron previously used, and all would fill the specification and claim made by the complainant.

The fact that the iron, at the point of contact with the wood, is double in thickness, or that the nail holes at the joints may be made elongated in order not to interfere with the nails in case of expansion or contraction, lengthwise, of the corrugations, will not sustain the patent; nor will his manner of forming the joints connecting the several sections of sheathing aid him. There is no novelty in the latter.

The bill is dismissed, with costs.

MARK E. REEVES v. THOS. VINACKE and others.

(District of Minnesota.)

1. MORTGAGE — MISTAKE IN DESCRIPTION — CORRECTION BY DECREE. — A court of equity will correct a mistake in a conveyance, and make the instrument conform to the intention of the parties, when that is made to

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appear, but such reformation will not be allowed to prejudice the rights of *bona fide* and innocent purchasers.

2. **SAME—NOTICE.**—Where V. purchased a tract of land upon which his grantor had given a mortgage by a fatally defective description, and assumed to pay the mortgage, stipulating that the premises he purchased were the same on which the mortgage rested, held that he was estopped to claim as an innocent purchaser.
3. **SAME—SAME—RECITALS IN TITLE DEEDS.**—A purchaser of land is bound to take notice of the recitals in the deeds of conveyance through which he derives title.
4. **STATUTE OF LIMITATIONS.**—An action to reform and foreclose a mortgage may be brought within ten years, under that clause of the statute of Minnesota which declares that "every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues."

Gilman, Clough & Lane, for complainant.

Geo. L. & Chas. E. Otis, for defendants.

This suit is brought to foreclose a mortgage executed June 25, 1868, by C. B. Jordan, and to correct a description of the property in the same. The facts are these:

On the above date, C. B. Jordan, to secure a note given R. Morrison for the benefit of the firm of Messrs. Bohrer, Morrison & Reeves, merchants in this city, agreed to execute a mortgage upon a tract of land then owned by him in the county of Renville in this district, described as follows: "Commencing at the southeast corner of the southwest quarter of section 12, town 117, range 31 west, running thence north 15 rods, thence west 5 rods, thence south 15 rods, thence east to the place of beginning, containing one and one-half acres," and for that purpose did execute and deliver to Morrison, a member of the firm, a mortgage intended to embrace an undivided one-half of this land, which instrument was duly recorded April 25, 1870. Soon thereafter and before the note was due, for value, the firm sold and assigned the note and mortgage to the complainant, who, in May, 1870, after the maturity of the note, proceeded to foreclose the mortgage in

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the state court, when for the first time it was discovered there was a mistake in the description of the property. The words "of the southwest quarter," fixing the starting point in the description, had been omitted, and it read "at the southeast corner of section twelve, etc.," instead of "at the southeast corner of the southwest quarter of section twelve." This was not the property intended to be mortgaged and was not owned by said Jordan, and the complainant dismissed his suit without prejudice.

In the meantime, Jordan, on January 1, 1869, sold and conveyed the property by warranty deed to the defendant Vinacke, and in this deed inserted the following recital:

"It is understood between the parties that the above described premises are the same that C. B. Jordan mortgaged to Robert Morrison to secure his note to Bohrer, Morrison & Reeves, which mortgage said Vinacke agrees to pay."

Vinacke conveyed the same to defendant Kennedy by warranty deed, who took the conveyance with full notice of the mortgage. The defendants, Geo. F. Jewett and Horace A. Jewett, derive their title under and through the deeds from Jordan to Vinacke and from Vinacke to Kennedy, but took their title without actual notice of said mortgage.

NELSON, *District Judge*.—The evidence in this case establishes the fact of a mistake in the mortgage executed by Jordan to Morrison, and a court of equity will, when appealed to, correct such a mistake and reform the instrument so as to express the intent of the parties thereto. This is a fundamental rule of equity jurisprudence, and, the mistake being mutual, the mortgage will be declared a lien upon the property intended as between the parties. If the titles of the Jewetts, as *bona fide* purchasers, have intervened, a reformation of the mortgage will not be allowed to prejudice their titles. But if their rights were subsequently acquired with notice, actual or constructive, they are subject to Morrison's lien. The delay in bringing suit to correct the mistake, which shows laches

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on the part of the complainant, is satisfactorily accounted for.

The recital in the deed from Jordan to Vinacke is evidence against him; and it being stated that a mortgage had been given, and Vinacke agreed to pay it, such recital is intended as the agreement of the parties and estops them. Vinacke has thus admitted conclusively the lien of the mortgage and assumed a personal liability. It cannot be doubted that the doctrine of privity prevails, and all persons claiming title to the property under and through Vinacke & Kennedy are privies in estate, and can be in no better situation than they are from whom the title is obtained. *Jackson v. Carver*, 4 Pet. 83; 6 Pet. 250; 9 Wend. 209; Story's Equity, secs. 152, 165.

The defendants, Geo. F. and Horace A. Jewett, on investigation of the title, would necessarily discover the recital that the mortgage was intended to cover the land described in the deed, and at least were required to make inquiry of Jordan or Vinacke or Kennedy. 41 N. H. 560. The registry law of this state does not require a description of the property to be contained in the index book or reception book. R. S. Minn. secs. 156, 157, p. 126. The names are indexed, through whom the titles would be traced; and in so doing, the defendants Jewett were required to look beyond the index book and examine the book where the description is recorded, and are charged with knowledge of all facts recited therein. If they failed to do so it was negligence.

The case of *Shroyer v. Nickel*, 55 Mo. 264, has no application to the one at bar. In that case the deed sought to be reformed was executed by a married woman, jointly seized with her husband, and the court placed the decision upon the *statutory regulation specifically pointing* out how a married woman could bind herself; and inasmuch as the deed, as executed (according to the statute), did not convey the land intended, a reformation of the instrument was beyond the reach of equitable interposition. The distinction between re-

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forming a deed as to the husband and as to a wife, is clearly stated in the discussion of the case above referred to. Vol. 7, Central L. J. 183.

It is claimed the cause of action is barred by the statute of limitations, enacting (Title II, chap. 66, p. 451, sec. 3): "Actions can only be commenced within the periods prescribed by this chapter, after the cause of action accrues, except where in special cases a different limitation is prescribed by statute." (Sec. 6.) Within six years. An action upon a contract, etc

Is this an action upon a contract?

The complainant by his bill seeks to foreclose a mortgage, and states therein that, as executed, it did not cover the property intended to be mortgaged by the parties thereto, and asks a correction of the mistake, so as to express the intention of the mortgagor and mortgagee, and make it such as they supposed was executed and delivered.

If the instrument to be reformed was an agreement to execute a mortgage, the limitation of six years within which actions on contracts can be commenced, might control. In my view of the case, if any statutory limitation governs, it is that prescribed by section 11 of chapter 66, viz.: "Every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues."

The complainant is entitled to a decree for the relief prayed, and it is so ordered.

DILLON, *Circuit Judge*, concurs.

Foote v. County Court of Howard County.

UNITED STATES *ex rel.* FOOTE v. COUNTY COURT OF HOWARD COUNTY.*(East Division of Western District of Missouri. April, 1880.)*

1. LOCAL TAXATION FOR BENEFIT OF RAILROAD CORPORATION—STATUTES CONSTRUED.—The charter of a railroad company enacted in 1865, authorized the corporate authorities of any city, town or county to subscribe to its capital stock, issue bonds therefor, and levy a tax of not to exceed one-twentieth of one per cent. per annum on the taxable property of the municipality to pay same. A subsequent act, passed in 1868, authorized subscriptions by townships, in pursuance of a vote of the people, to the stock of any railroad company, building or proposing to build a railroad into, through, or near the township voting the subscription, and authorized taxes to be levied to meet the payments on account of such subscriptions. *Held*, that to pay the bonds issued under the latter act, the respondents were bound to levy whatever tax was necessary for that purpose, and were not restricted to one-twentieth of one per cent. per annum.
2. CONTRACT—LAWS IN FORCE WHEN CONTRACT WAS MADE—SUBSEQUENT LEGISLATION.—Laws in force when such bonds are issued, and which provide for taxation to pay them, enter into the contract between the bond holder and the state, and as against the former such laws cannot be repealed. Otherwise as to acts enlarging the taxing power passed after the issue of such bonds.

Demurrer to alternative writ of *mandamus*.

Henderson & Shields, for relator.

John D. Stevenson, for respondents.

McCRARY, *Circuit Judge*.—The relator recovered judgment in this court, February 5, 1879, against Howard county, for \$5,258.80. The judgment was upon coupons detached from bonds issued by said county July 1, 1869, under the provisions of "An act to facilitate the construction of railroads in the state of Missouri," approved March 23, 1868, known as the "Township Aid Act." The bonds were issued by said county in behalf of Chariton township, in pursuance of a vote of the people of that township, as provided by said act, and in

payment for a subscription to the stock of the Missouri & Mississippi Railroad Company.

An alternative writ of *mandamus* was issued on the ninth of September last, commanding respondents to levy and cause to be collected, in the same manner as county taxes, a special tax on all the property, lying and being in said township, made taxable by law for such purposes. To the return of the respondents to this alternative writ a demurrer is interposed, which presents for our consideration the following questions:

First. Whether, under the act of 1868, above cited, the respondents are authorized to levy a tax of more than one-twentieth of one per cent. per annum for the payment of interest and principal of the aforesaid bonds.

Second. Whether such tax shall be levied upon real estate alone, or upon both real and personal property.

Upon the first question it is insisted, by counsel for the respondents, that the power of taxation conferred by the act of 1868 is limited and restricted by section 13 of the act to "incorporate the Missouri & Mississippi Railroad Company," approved February 21, 1865. That section is as follows: "It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year." Sess. Laws of 1865, p. 88.

It will be observed that this was a provision for subscriptions by counties and cities to the stock of that particular company without a vote of the people. It was, in my judgment, a limitation upon the power of taxation to pay subscriptions made under that act, and has no application to a subscription made under the act of 1868. This is reasonably plain upon the face of the section itself, for it authorizes the subscription, and at the same time prescribes the mode of levying taxes for its payment.

The one is evidently to be referred to the other; the taxa-

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tion authorized is for the payment of the subscription provided for, and was not intended to be applied to subscriptions to be received by the company from other sources and under subsequent legislation. But if this question were doubtful under the terms of the original charter, it is made clear by reference to the act of 1868, under which the subscription was made.

Section 2 of that act is as follows: "In order to meet the payments on account of the subscription of the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied upon all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

There is nothing in this language which indicates a purpose on the part of the legislature to limit the taxes to be levied to such as the charter of the company subscribed to, might authorize. If such a purpose had existed, it would certainly have found expression in the act. The contrary is quite clearly expressed.

The act is complete in and of itself, and to incorporate into it the thirteenth section of the charter of the M. & M. Railroad Company would only tend to render its terms confusing and contradictory. It makes no reference to any other act. Section 1 authorizes subscriptions to "any railroad company in this state, building or proposing to build a railroad into, through or near" the township voting the subscription. The act was adopted as a new and independent means of facilitating "the construction of railroads in the state of Missouri." Besides, the tax was to be "to meet the payments on account of the subscription to the stock according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription." The

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plain meaning is that the tax shall be sufficient for these purposes. I am, therefore, of the opinion that the tax to be levied is not limited to one-twentieth of one per cent, but is a tax sufficient to pay relator's judgment.

It remains to consider the second question. The act of 1868, under which the bonds were issued, provides for a levy of taxes to pay the same, upon real estate only. This act entered into and became part of the contract, and the legislature could not, by subsequent repeal, deprive relator of his rights under it. The provision of the constitution, that no state shall pass a law impairing the obligation of contracts, is a limitation upon the taxing power of a state, as well as upon all its legislation, whatever form it may assume. Therefore, a legislative act which assumes to repeal any tax law in force when relator's bond was issued, and under which he was entitled to enforce payment, is, as to him, unconstitutional and void. *Murray v. Charleston*, 96 U. S. 432.

This much is conceded. But, by an act of the general assembly of Missouri, approved March 10, 1871 (several years after the issue of the bonds in controversy), it was provided that taxes to pay such bonds should be levied "on all real estate and personal property, including all statements of merchants doing business," within the township. Acts of 1871, p. 55.

It is claimed that this latter act has been repealed by being omitted from the Revised Statutes of Missouri recently enacted. It is not suggested by counsel for relator that this act is kept alive by any general saving clause of the Revised Statutes, and I assume that it is no longer in force; and that being so, the question is whether it was in its nature a contract between the relator and the state, so that its repeal should be held to be, as to him, a violation of the federal constitution, and therefore void. I know of no authority for the proposition that acts of the legislature passed after the issuance of the relator's bonds can be held to be a part of the contract with him, and upon the faith of which he invested his money. It is only the laws in force at the time the contract is made that enter into it. The subsequent enlargement of the taxing

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power was a matter of gratuity on the part of the state, for which there was no new consideration moving from him.

It does not appear that he purchased his bonds after the passage of the act of 1871, and relying upon its provisions. If it did, the question would arise whether he had any right to rely upon any legislation as irrepealable, except that in force when the bonds were issued; and, as at present advised, I should hold that he was bound to know the law, which is that all acts not in force when the contract was made were subject to be altered, amended or repealed by the state.

It is unnecessary to discuss the other questions raised by the demurrer. The return is clearly insufficient.

The demurrer is sustained.

NOTE. — After the foregoing opinion was announced, the attention of the court was called by counsel to section 3161 of the Revised Statutes of Missouri of 1879, under which the court held that the act of the general assembly of Missouri of March 10, 1871, providing for taxation of both real estate and personal property for the payment of the bonds in question, was continued in force.

CHEW and others v. HENRIETTA MINING & SMELTING COMPANY
and others.

(*Eastern District of Missouri. March, 1880.*)

1. CORPORATE BONDS — NOTICE — AGENCY. — A purchaser takes corporate bonds at his peril, where he has notice that an authorized agent is disposing of such bonds to him for an unauthorized purpose.
2. SAME — SAME — OFFICER OF CORPORATION. — In the absence of notice, such purchaser may presume that an officer is acting within the scope of his authority when acting as the agent of such corporation.
3. MARRIED WOMAN — NOTICE TO HUSBAND. — In transactions relating to her separate estate, a married woman is only bound by notice given to her husband in so far as he acts as her agent.
4. CESTUI QUE TRUST — NOTICE TO TRUSTEE. — Notice to a trustee is not notice to the *cestui que trust*, where the trustee has no official relation to the transaction in controversy.

In equity.

Hitchcock, Lubke & Player, for complainants.

M. B. Jonas, for respondents.

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MCCRARY, *Circuit Judge (orally)*.—This case is submitted upon exceptions to the report of the master. It is a bill filed to foreclose a mortgage upon six hundred and forty acres of land in this state, executed to secure one hundred bonds issued by the defendant corporation. Several parties appear in this case, claiming to be owners of some of these bonds. The master has reported his conclusions with regard to the title of each of the claimants. The only questions presented relate to the title of the plaintiff Chew and the defendant Burch. Chew claims to be the owner of several of these bonds, and the master finds that he has no title. There is an exception to this finding. Burch claims to own a large number of them, and the master finds in his favor. There is an exception also to this finding. The bonds are negotiable, and, according to the repeated decisions of the supreme court of the United States, they have all the qualities of negotiable commercial paper. Part of them were placed in the hands of one Muir, with authority to negotiate them for the benefit of the corporation. I think the language of the resolution of the corporation was "for the purpose of raising money to develop the mines."

Muir held these bonds in New York as the agent of the corporation, with this authority, and no other. He placed some of them in the hands of a man by the name of Dever, who transferred them to plaintiff Chew, in order to raise money; not, however, for the corporation, but for Muir's private purposes. Of course the question here is, and the only question is, as to notice. Where a corporation places its bonds in the hands of an agent, with power to negotiate them, and puts them in that way upon the market, before maturity, the purchaser has a right to presume that the agent is acting within the scope of his authority, and is not bound to inquire into the application he is to make of the proceeds of the sale. But if the purchaser is informed upon this subject, and has notice, then, of course, he takes them at his peril. The proof upon this point, so far as Chew is concerned, is found in his testimony, quoted by the master, as follows:

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"Interrogatory 4. Did said Dever state for whose account he applied for loans on said bonds? *Answer.* Yes. He said the bonds were owned by William Muir, or held by William Muir; that said Muir was the agent of the Henrietta Mining & Smelting Company, at New York; that \$100,000 of said bonds had been prepared for issuance by said company, the proceeds of sale of which were to be applied to the purchase of machinery to work the mine, which he said was located near Potosi, in the state of Missouri; he said further that William Muir was pressed for funds, and had requested him to make loans for him (Muir) on the said bonds."

I agree with the conclusion of the master that upon that statement Mr. Chew was fully informed, not only as to the nature and extent of Muir's authority, but of the fact that he was violating it in so placing the bonds for the purpose of raising money for his own purposes, and not for the corporation; and, on that ground, the exception to the report, so far as that part of it is concerned, is overruled.

As to the other part of the case — the title of the defendant Burch to the bonds represented by him,—I have had more difficulty. But in this case, as in the other, it is simply a question of notice; and I believe the rulings of the supreme court go so far as to hold that there must be something amounting to bad faith on the part of the purchaser before his title to negotiable paper of this kind, purchased in the open market, can be defeated. An important fact in the case, as bearing upon the question of good faith, is this: Mrs. Burch advanced money—the title of the present defendant being derived from Mrs. Burch, of course the question is as to her title—to the secretary of the company, and to her husband, for the purpose of paying a debt for which the corporation was liable in equity. The debt was created for the purchase of this very real estate which is now in controversy. It was taken in the name of Edgerton, the secretary of the company, and Burch, as a mere matter of convenience, I apprehend, and they advanced on the payment of the purchase money

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something over \$2,000, and then conveyed it to the corporation.

Now, it was to repay this money, by them advanced, that Mrs. Burch made the loan now in controversy. I say this has an important bearing upon the question of good faith, because it might well have been believed by Mrs. Burch that the secretary of the company had authority to use the bonds of the company for the purpose of raising money to pay this debt, which was a debt, in equity at least, against the corporation. Then, again, she received the bonds from the secretary of the corporation, and, I believe, it has been repeatedly held by the supreme court of the United States, and by other courts, that a purchaser of the bonds of a corporation may presume that an officer of the corporation, acting in the capacity of an agent of the corporation, is acting within his authority, unless actual or constructive notice is brought home to such purchaser. But it is said that the husband of this lady knew the facts, and that notice to the husband is notice to the wife. I think, however, that this is not true for all purposes. When a married woman is acting or contracting with reference to her separate estate, it is well settled that she is to be regarded as a *feme sole*.

In regard to such transactions, especially under the more modern and enlightened view of the subject, she is as independent of her husband as he is of her. She is bound, then, in such transactions, only by notice given to him in so far as he acts as her agent. The supreme court of Missouri has stated this doctrine in the sixty-seventh volume of the Missouri Reports, page 601, in the case of *Morrison v. Thistle*, as follows: "In equity, husband and wife are not, in a large number of cases, regarded as one and the same person. They, for this reason, may sue and be sued, contract and be contracted with, and become the creditor or debtor of each other with like effect, so far as regards equitable contemplation and rights, as if they had never become one flesh," citing numerous cases.

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Now, there is no proof that Mrs. Burch had any information with regard to the authority of the secretary of this company, except that she was assured that the transaction was all right and proper, and acted upon the faith of that assurance. Her husband was, in this case, in no sense her agent; on the contrary, he dealt not for her but with her; was one of the parties asking the loan from her, and I think, therefore, that this is not a case in which the doctrine that notice to the husband is notice to the wife, can have any force. It is also insisted that the trustee of Mrs. Burch, with respect to her separate estate (De Cordova), knew the facts, and that notice to him is notice to her; that is, that notice to the trustee is notice to the *cestui que trust*. The answer to that is that De Cordova, although her trustee with regard to her separate estate, was not her trustee with reference to this transaction at all. Holding as he did the naked title to her lands, and for her use and benefit, he joined with her in making the mortgage for the money to be loaned to these parties; but that was a separate transaction from the matter now in controversy, to wit, the hypothecation of these bonds, and with that the trustee had nothing to do.

The result of my examination of the case is that the exceptions to the report of the master must be overruled.

UNITED STATES v. CHARLES R. JENNISON.

(District of Kansas. June, 1874.)

FRAUDULENT CLAIMS AGAINST THE UNITED STATES—ACT OF MARCH 2, 1863, CONSTRUED.—The act of March 2, 1863 (12 Statutes at Large, page 696, sections 1-3), for the punishment of frauds upon the government by conspiring to obtain the payment or allowance of false claims against it, and by making false affidavits, etc., in support of such claims, construed and applied.

George R. Peck, District Attorney, for the United States.

T. P. Fenlon, J. B. Stewart and E. Stillings, for defendants.

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The defendant was indicted under the act of congress of March 2, 1863 (12 Statutes at Large, 696), for attempting to defraud the United States of the sum of \$52,843.64. The indictment in one of the counts charged the defendant with conspiring with one Elias K. Moss for that purpose. The defendant was in command of the Seventh Kansas Regiment, in 1861.

The affidavit on which the indictment was founded is as follows :

"STATE OF KANSAS, *County of Leavenworth*, ss.

"I hereby certify that on this 16th day of November, 1871, before me, the subscriber, personally appeared C. R. Jennison, late colonel in the war for the suppression of the rebellion, and now a citizen of the county of Leavenworth, state of Kansas, who, being duly sworn, makes oath that he is the identical Colonel C. R. Jennison who commanded troops in the Union army during the rebellion. That while colonel commanding, he was, by order dated October, 1861, and signed by Maj. Gen. Hunter, ordered to move his command to Kansas City, Mo., and there relieve Gen. Sturgis, who was ordered with his command to join Gen. Fremont, Sturgis' command being a part of Fremont's command. Gen. Sturgis was ordered to take all supplies, both quartermaster and commissary, with him to Fremont; that when his (Jennison's) command reached Kansas City, he was compelled to subsist there, both as to quartermaster and commissary stores, upon the country. He ordered his command as a matter of necessity to move on the city of Independence, county of Jackson, state of Missouri, and there to procure supplies; that he did move with his command to the said city of Independence, reaching there the fourteenth day of November; that he collected the citizens into the public square of said city of Independence, and there ordered the quartermaster goods in a hardware store in said city to be taken and carried away for the use of the army; that he has since learned and now knows that said hardware store belonged to Elias Kendall Moss, at that time of Independence, and that said goods consisted principally of such articles as were used

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in the quartermaster's department of the U. S. army; and he further states that the goods taken from said Moss at that time by his (Jennison's) command and by his order, were fully of the value stated by said Moss in the account presented by him against the United States, to the best of his knowledge and belief, to wit: \$52,843.64. He also states that in that community, as in all others, many articles were taken that were not strictly in accordance with government custom; thereby many innocent parties have suffered without the knowledge of the commanding officer. The quartermaster goods of the stock of hardware taken from the said Moss was used by and for the benefit of the army that could be used, and those things that were deemed unnecessary were sold, and the proceeds turned over to the government, as will appear by the records under his administration. Finally, he states the goods in the foregoing account were taken as a matter of necessity for the benefit of the United States, and were actually used and became the property of the United States.

"He further states that he has no interest in the prosecution of this claim, either direct or indirect.

"[Signed] C. R. JENNISON.

"Witness: JULIUS HAUG.

"Sworn to and subscribed before me this 16th day of November, A. D. 1871, and I hereby certify that the affiant is respectable and entitled to credit.

"[Signed] JULIUS HAUG,

"Clerk of the District Court in and for Leavenworth county, Kansas."

The indictment alleges that the material statements in this affidavit were false, and known to be so by the defendant when he made them. The evidence produced by the government tended to show that in November, 1861, Jennison's command took possession of — or, in the language of a witness, "jay-hawked" — Moss' store at Independence, Missouri, and carried away every article in it, the value of which, however, the prosecution claimed did not exceed \$5,000 or \$10,000, and that

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none of the goods was taken for or went to the use of the government. There was some counter evidence on these points. The specific nature of the charges in the indictment and the state of the case made by the testimony appear in the charge of the court.

Mr. Justice MILLER charged the jury orally, in substance, as follows: This trial, through which you have patiently sat for the last twenty-four hours, is no doubt considered by the government and by the defendant, as one of very considerable importance, and it is important to both parties. I shall endeavor, therefore, to lay down the principles of law that are applicable to the case as clearly as I can, so as to enable you to come to a just conclusion.

The charge, or charges, — for there are four counts in the indictments, — may be divided substantially into two charges, as they are described in the statute upon which the indictment is founded. The first of these which I will mention, though not the first in order, is the charge of conspiracy. The language of the statute on that subject is: "Any person who shall enter into an agreement, combination or conspiracy to cheat and defraud the government of the United States, or any department or officer thereof, by obtaining or assisting to obtain the payment or allowance of any false or fraudulent claim, shall be" subjected to a certain punishment. That is the language of the act defining conspiracy. And it requires a combination or agreement between two persons, for the purpose of cheating and defrauding the United States in procuring the payment of a false claim.

The alleged false claim here is the one set up by Mr. Moss. The charge is that the defendant, Col. Jennison, and Mr. Moss, entered into a combination for the purpose of cheating the United States, by imposing this false claim upon it.

In order to convict the defendant on that charge, it is indispensably necessary that you should be convinced by the testimony that there was such a combination or agreement between

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these two parties. The question whether the defendant aided or intended to aid in imposing a false claim on the government, is another question, and different from conspiracy. He may have intended to aid it without entering into a conspiracy. There must have been a combination, an agreement, an understanding between them that there was a claim to be presented, that it was a false claim, and that they combined, united for the purpose of imposing it on the government, and thus cheating and defrauding it.

I think I can take the liberty of saying to you, that, in the absence of any testimony whatever that Jennison ever in his life saw Mr. Moss, and there being no claim that those two men ever met, or even exchanged correspondence in writing, never even knew each other personally, I think I may say to you that you may dismiss the charge of conspiracy from your consideration. There is not sufficient evidence to sustain the charge of conspiracy.

Then there remains the other charge—the one made here,—which is described in the following language in the statute: “Any person who shall, for the purpose of obtaining or aiding in obtaining the approval or payment of any such (false) claim, make, use or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit or deposition”—which is the offense charged here—“knowing the same to contain any false or fraudulent statement or entry, or who shall make or procure to be made, or knowingly advise the making of any false oath to any fact, statement or certificate, voucher or entry, for the purpose of obtaining or of aiding to obtain any approval or payment of any claim against the United States, or any department or officer thereof,” shall be punished, etc.

This is the language of the statute, and is what has to be established to your satisfaction as having been done by Col. Jennison, in order to convict him.

The charge here, divesting it of all the other matters, is that

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the defendant made a false affidavit in support and in aid of a false claim of Mr. Moss against the government of the United States.

Now, I instruct you that it is necessary that the claim itself should be a false claim; in the next place, that the defendant should have made an affidavit; and in the next place, in that affidavit he should have stated facts which were not true; and in the next place, he should have known that they were not true; and he should have stated them with the intent of aiding Mr. M. in cheating and defrauding the government. These elements are necessary for a conviction.

I perhaps might stop here, as that is the law, and about all the law of this case, but I think it proper myself to take some notice of what has been shown in the case. You have all seen the claim, which is satisfactorily shown to have been presented by Mr. Moss against the United States, and the affidavit of the defendant has been read, and his statements been commented upon, and are familiar to you.

The main reliance of the government to convict the defendant is upon the supposed false statement as to the amount or value of the loss sustained by Mr. Moss in consequence of what might be called the raid of the 14th of November, 1861; and second, in the falsehood of the allegation made, that the goods were taken for the uses and purposes of the army of the United States, and if they were not used, a large part or the whole of them were sold, and, to use a modern phrase, the money covered into the treasury. That is the substance of what Jennison swears to in that matter.

As regards the value of these goods, the testimony is very inconclusive in every respect. There is no pretense of testifying to the value of the whole or any part of the goods. There is no pretense of producing any exhibits or invoices or written statements of the actual value of the goods at any time, either just before or just after, or any number of years before or after they were taken.

The United States has relied wholly on the evidence of one

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or two men who claim to have been familiar with the goods in the store and with the size of the store. That is the class of evidence which I have permitted to go to you, and which I remarked at the time, was to be considered for what it was worth. It is very sure that no man going to a store and looking at the goods in it, unless he makes some very accurate calculations or close examinations, can give a certain judgment as to the value of the goods. Nevertheless, inasmuch as that is the best the government has been able to produce, it goes to you for what it is worth. The discrepancy between the witnesses and the amount sworn to by Col. Jennison is very large. It is for you to consider how much nearer correct they are than Jennison, and also what opportunities Jennison had to know.

It is further proper to say that one of the witnesses for the government stated, on looking at Moss' bill, that the prices put down there were not exorbitant prices. The prices claimed by Moss, their own witness stated to be fair prices. So I think you can hardly charge to Jennison an error or mistake as to the amount or value of the goods, as far as concerns the prices, if the schedule shown is correct. But if he is mistaken at all — if he made a false statement at all — to use the language of the indictment, it is probable its falsity consisted in the quantity of the goods. I leave it for you to say whether the defendant intended to commit a crime, the punishment for which might be a term of years in the penitentiary. It is for you to consider all the circumstances under which he might have made an honest mistake. It does not appear that he was ever inside of the store. We have had the testimony of witnesses who were there. Col. Anthony was there, and other witnesses were there, but no man says that Jennison was in the store at that time, or at any other time; therefore he is not chargeable with a knowledge of the quantity of the goods from a personal inspection of them. You should consider that the witnesses testify ten years after the transaction occurred, and that it occurred under circumstances likely to confuse a man, if he were

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looking at the goods, and it is for you to say whether Jennison made a false statement in regard to the value of those goods.

The other branch of the case is the one I apprehend you will have difficulty over, if you have any difficulty at all, and that is, he is charged, and the affidavit does say, that he took those goods for the use and benefit of his own regiment; though he says in the affidavit that many of them were misapplied and appropriated without his knowledge to wrongful purposes. He says what were not used by the troops were sold by him and the proceeds turned over to some quartermaster. In regard to that he has offered no proof whatever. The other side has offered some circumstantial testimony to show that that is probably not true. They have attempted to show, with what success I leave for you to say, that the troops were not in need of goods of the kind in that store. They have attempted to show that those goods could not have been carried away. They have attempted to show that he could not have sold those articles, and the proceeds put in the treasury, because Col. Anthony states if any such thing had occurred he must have known it. On the other hand, it is to be observed that while the witnesses say only one wagon — and one says only an ambulance — was there, the testimony shows that five or six came away. What amount of those goods could have been moved in the wagons? Were any of the goods applied to the service and use of the regiment? And did he, as he claims, sell any of them after, though irregularly, without taking a voucher, and deposit the money in some place that he thought was the proper place? That is for you to say. It is your duty to determine whether he made a false statement under oath, knowing it to be untrue, and whether he made it with a willful purpose of cheating the government. If he has made a statement and sworn to it, not corruptly, but without much thought or investigation, and having some circumstances on which to base it, you will not be hard with him. But if you believe he had a corrupt purpose, — had an intention to aid in defrauding the government, —

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if he swore to what was false and knew it to be false, you will find him guilty.

NOTE.—The jury, after being out a few minutes, returned a verdict of "not guilty."

THE MISSOURI VALLEY LIFE INSURANCE COMPANY v. KITTLE
and others.

(District of Nebraska. May, 1880.)

1. USURY — QUESTION OF FACT.— Any agreement, device or shift to reserve or take more than the law permits for the use of money loaned, is usury, and whether by such means more than the legal rate of interest has been contracted for, is a question of fact to be collected from the whole of the transaction as it passed between the parties.
2. SAME — AGREEMENT FOR INSURANCE IN LENDER'S COMPANY.— A transaction whereby a party, in order to secure a loan of money, contracts to pay twelve per cent. per annum interest, the maximum rate allowed by law, and also as a part of the same transaction, and in consideration of such loan, agrees to take from the party loaning the money a policy of insurance, and to pay premiums thereon, is usurious under the statute of Nebraska.
3. SAME — PAYMENT OF INSURANCE PREMIUMS.— Payments made in such a case, under the name of premiums on the insurance policy, must be regarded as paid on the loan; the insurance contract, made as it was to cover usury, being held void.

J. M. Woolworth, for plaintiff.

E. Wakely, for defendant.

MCCRARY, *Circuit Judge*.— Bill in equity brought to foreclose a mortgage upon certain real estate in Nebraska, executed by Robert Kittle and wife to the plaintiff, to secure the payment of a certain promissory note for \$2,500.

The defense is that the note sued on is usurious. The legal rate of interest under the law of Nebraska is twelve per cent. per annum, and this rate is contracted for by the terms of the

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note. It is claimed by the defendants that, in addition to the lawful interest thus provided for, a further consideration for the loan was exacted by the plaintiff under the cover of a transaction of insurance entered into between the plaintiff and defendant Robert Kittle. The plaintiff is a corporation organized under the laws of Kansas, and its purposes are declared by article four of its charter, among other things, to be "to make insurance upon the lives of individuals, * * * and to make such legal investments of all moneys received as premiums for policies issued and from other sources as will best promote the interests of all concerned; and, carrying out the objects of said corporation, may loan the money of the corporation at a percentage not exceeding twenty per cent. per annum." It is clear that the company was organized for the purpose of engaging in the business of insuring the lives of individuals and of loaning money, and it does not appear, either from the charter or the evidence, that the loaning of money was merely incidental to the business of insurance. It is pretty evident, I think, that the company looked to the income to be derived from investments and loans as the chief source of its profits; but however this may be, it is safe to assume that loaning money was one of the primary objects for which the company was created.

The defendant Robert Kittle applied to the plaintiff for a loan of money. He did not desire, and did not apply for, a policy of insurance upon his life. He was informed in substance that the company was loaning money, and would loan him \$2,500 upon satisfactory security, provided he would take from plaintiff a policy of insurance upon his own life or that of some other person for \$5,000, and pay the premiums, amounting to about \$300 per annum. Whether more than the legal rate of interest has been contracted for, is a question of fact to be collected from the whole of the transaction as it passed between the parties. We are to inquire whether there was an agreement, device or shift to reserve or take more than the law permits. It is not usual to express an usurious

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contract upon the face of a written agreement. "The charge of usury," says Mr. Tyler, "in most instances attaches to pretended cases of exchange of credits or commodities, or when a profit is realized for something besides the use of the money loaned or the debt forborne." Tyler on Usury, 105. We must, therefore, inquire whether, considering the whole transaction, there has been a successful effort on the part of the plaintiff to obtain, under color of the insurance transaction, exorbitant and unlawful gain for the use or forbearance of the money loaned to defendant Robert Kittle. Were these, two separate and independent *bona fide* transactions between the parties—one a loan of money at a lawful rate of interest, and the other the taking by defendant Robert Kittle of a policy of insurance upon his life from the plaintiff? Or were the two so intermingled as to constitute only one transaction, one result of which was that plaintiff actually received or contracted to receive more than twelve per cent. per annum interest as a consideration for the use of the money loaned?

The evidence, as it appears in the depositions, might leave us in serious doubt as to the true answer to be given to these questions, but the matter is rendered reasonably clear by reference to the mortgage sued on, which must be accepted as an authoritative statement of the contract as understood by the parties themselves, and which provides as follows: "And the parties of the first part hereby agree, in consideration of the aforesaid loan, to take out and keep in force during the continuance of said loan, a policy of life insurance in the Missouri Life Insurance Company aforesaid, upon his own life or the life of some other person, and upon which he hereby agrees to pay or cause to be paid to said company the annual premium thereon, and not less than \$310 per annum. And it is further agreed in consideration of said loan, that all renewals thereof, or extensions of time of payment thereof, are upon the express condition of the payments upon said life insurance policy being made when due; * * * that any neglect or refusal so to do shall cause the whole amount

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of said loan to become immediately due and payable, any agreement of renewal or extension of payment to the contrary notwithstanding."

This language is explicit, and from it we learn that the two transactions were, in some respects at least, blended into one. The insurance was taken in consideration of the loan. It was not a clause inserted in pursuance of a policy to loan only to policy holders, for it stipulates that the policy to be taken may be upon the life of the borrower "or the life of some other person."

It was the profit to be derived from the transaction of insurance that was demanded "in consideration of the loan," it being expressly declared that premiums amounting to not less than three hundred and two dollars per annum were to be paid to said company. It was further agreed, "in consideration of said loan," that a failure to pay premiums on the policy of insurance should work a forfeiture of all renewals or extensions of time of payment of the loan, and cause the whole amount thereof, both principal and interest, to become immediately due. The contract of insurance was very clearly demanded by the plaintiff as a condition precedent to, and an additional consideration for, the loan of the sum of two thousand, five hundred dollars to defendant Robert Kittle. It was a thing of value to the company — a transaction out of which it was to make a considerable profit; and, as twelve per cent. per annum had been otherwise contracted for and reserved, the agreement for additional compensation for said loan rendered the said loan usurious. To hold otherwise would be not only to disregard the plain terms of the contract, as expressed in the mortgage, but also to point out the way by which insurance companies may easily evade the statutes of the several states prohibiting usury.

In this case the payments which have been made under the name of premiums on the insurance policy must be regarded as paid on account of said loan; the insurance contract, made as it was as a cover for usury, being held void.

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The statute of Nebraska on the subject of usury in force when this loan was made, to wit, the eighteenth day of November, 1872, will determine the rights of the parties in view of this opinion, and decree will be entered accordingly.

MILLER, *Circuit Justice*, concurs in the foregoing opinion.

WM. GOODFELLOW v. JOSEPH MUCKEY, MARY MUCKEY and
L. H. OGEE.

(*District of Kansas.*)

1. INDIAN TREATY — CONSTRUCTION OF GRANT MADE THEREBY.— Grants and reservations claimed under Indian treaties are strictly construed against the grantee or beneficiary.
2. INDIAN TITLE POSSESSORY IN GENERAL.— It has been uniformly held by the supreme court of the United States that (in the absence of express legislation by congress to the contrary) the Indian title is but a right of occupancy, the fee remaining in the United States.
3. POTTAWATOMIE TREATY, NOT A GRANT IN PRESENTI.— The treaty between the United States and the Pottawatomie tribe of Indians, of November 15, 1861 (12 U. S. Stat. 1192), is not an exception to this general rule, and does not amount to a grant *in presenti*.

FOSTER, *District Judge*.— This is an action of ejectment brought by the plaintiff to recover the south half of section thirty, town ten, range fifteen, in Shawnee county, Kansas.

The plaintiff claims title by a master's deed, made under judicial sale, of land on decree of a foreclosure of a mortgage executed by Joseph Muckey. The land in controversy was allotted to Mary Muckey, a minor, under the treaty between the United States and the Pottawatomie tribe of Indians, concluded on the fifteenth day of November, 1861 (12 U. S. Stat. 1192), and afterwards, on the sixteenth day of May, 1870, patented to Joseph Muckey, the head of a family, under the provisions of article six of the treaty between the United States

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and the Pottawatomie tribe, concluded February 27, 1867 (15 U. S. Stat. 533).

So much of the treaty of 1861 as is pertinent in this case, is as follows:

"Article 1. The Pottawatomie tribe of Indians, believing that it will *contribute to the civilization of their people* to dispose of a portion of their present reservation in Kansas, consisting of five hundred and seventy-six thousand acres, which was acquired by them for the sum of \$87,000, by the fourth article of the treaty between the United States and the said Pottawatomies, proclaimed by the president of the United States on the twenty-third day of July, 1846, and to *allot lands in severalty* to those of said tribe who have adopted the customs of the whites and desire to have separate tracts assigned to them, and to assign a portion of said reserve to those of the tribe who prefer to hold their lands in common; it is therefore agreed by the parties hereto that the commissioner of Indian affairs shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed; the expense thereof shall be paid out of the sales of land hereinafter provided for, and the quantity of land hereinafter provided, to be set apart to those of the tribe who desire to take their lands in severalty, and the quantity hereinafter provided to be set apart for the rest of the tribe in common, and the remainder of the land, after the special reservation hereinafter provided for shall have been made, to be sold for the benefit of said tribe.

"Article 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages and number of those *desiring lands in severalty* and of those *desiring lands in common*, designating *chiefs and head men* respectively, each adult choosing for himself or herself, and each *head of the family for the minor children of such family*, and the agent for orphans and persons of an unsound mind; and thereupon there shall be as-

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signed, under the direction of the commissioner of Indian affairs, to each chief, at the signing of the treaty, one section; to each head man, one-half section; to each other head of a family, one-quarter section; and to each other person, eighty acres of land, to include in every case, as far as practicable, *to each family*, their improvements, and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignment shall have been completed, certificates shall be issued by the commissioner of Indian affairs for the tracts *assigned in severalty*, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation or sale, and shall be alienable in fee, or leased or otherwise disposed of, *only to the United States or to persons then being members of the Pottawatomie tribe, and of Indian blood, with the permission of the president*, and under such regulations as the secretary of the interior shall provide, except as may be hereinafter provided; and on receipt of such certificates the person to whom they are issued shall be deemed to have relinquished all right to any portion of the land assigned to others, in severalty, or to a portion of the tribe in common, and to the proceeds of the sale of the same whensoever made.

“Article 3. At any time hereafter when the president of the United States shall have become satisfied that any adults, *being males and heads of families*, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them *by patent in fee simple, with power of alienation*; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States,

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and also as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty; and *on such patents being issued and such payments ordered to be made by the president, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States*, and thereafter the land so patented to them shall be subject to levy, taxation and sale, in like manner with the property of other citizens; provided, that before making any such application to the president, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, *and that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.*

"Article 4. To those members of said tribe who desire to hold their lands in common, there shall be *set apart* an undivided quantity sufficient to allow one section to each chief, one-half section to each head-man, and one hundred and sixty acres to each other head of a family, and eighty acres of land to each other person, and said land shall be held by that portion of the tribe for whom it is set apart, *by the same tenure as the whole reserve has been held by all of said tribe*, under the treaty of one thousand eight hundred and forty-six. And upon such land being assigned in common, the persons to whom it is assigned shall be held to have relinquished all title to the land assigned in severalty, *and in the proceeds of sales thereof whenever made.*"

Under the third article of this treaty a certificate of allotment for this land was issued to Mary Muckey, numbered 1,285, said allottee being a child perhaps a year old.

The sixth article of the treaty of 1867 reads as follows:

"Article 6. The provision of article third of the treaty of April nineteenth, eighteen hundred and sixty-two, relative to

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Pottawatomies who desire to become citizens, shall continue in force, with the additional provision that, before patents shall issue and full payments be made to such persons, a certificate shall be necessary from the agent and business committee that the applicant is competent to manage his own affairs; and when computation is made to ascertain the amount of the funds to which such applicants are entitled, the amounts invested in the new reservation provided for in the treaty shall not be taken into account; and where any member of the tribe shall become a citizen under the provisions of the said treaty of eighteen hundred and sixty-two, *the families of said parties shall also be considered as citizens, and the head of the family shall be entitled to patents and the proportional share of funds belonging to his family*; and women who are also heads of families, and single women of adult age, may become citizens in the same manner as males."

Under this article a patent for said land was issued to Joseph Muckey as the head of the family. The patent recites the issuing of the certificate of allotment, but purports to convey the absolute title in fee to the patentee. Joseph Muckey mortgaged the land, and the mortgage was foreclosed, the land sold, and this plaintiff became the purchaser thereof.

The question arises, did Joseph Muckey have such a title that he could make a valid conveyance?

The plaintiff maintains that the patentee held the absolute fee simple title free from all equities or trusts in favor of the allottee.

On the other hand it is claimed by defendants, that by the treaty of 1861, and the certificate of allotment issued in pursuance thereof to Mary Muckey, the whole title of the government to the land passed to the allottee as by absolute, irrevocable grant, and that the patent subsequently issued to Joseph Muckey as the head of the family, under article six of the treaty of 1867, was absolutely null and void.

As a rule, legislative grants must be interpreted, if practi-

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cable, so as to effect the intention of the grantor, but if the words are ambiguous, the true rule is to construe them most strongly against the grantee. *Rice v. Railroad Co.* 1 Black, 360.

All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language. *Railroad Co. v. Litchfield*, 23 How. 66.

This rule of construction may very aptly be applied to grants and reservations claimed under Indian treaties.

It has been the traditionary policy of the government in treating with the Indian tribes, to reserve from the public domain tracts of land for the use and occupation of the Indian tribes, and to limit them to such reservations. The right of the Indians to have and occupy these lands for themselves and their families, has been granted in language more or less comprehensive, but always evincing a purpose on the part of the general government to limit the Indian title to the use and occupation of the land.

In some instances their lands have been patented to them in fee simple so long as they should exist as a nation and *remain on the land*.

Such were the provisions of the treaties with the Senecas and the Shawnees, made in 1861. 7 U. S. Stat. 349, 352.

In most treaties the words "set apart" and "reserved" are used in appropriating portions of the public lands for the homes of the Indian tribes.

In the treaty with the Menomonies of Wisconsin, in 1831 (7 U. S. Stats. 342), the following language was used:

"The following described tract of land, at present *owned and occupied* by the Menomonie Indians, shall be *set apart and designated* for their future homes."

The supreme court in construing this treaty use the following language: "The land thus recognized as belonging to the Menomonie tribe, embraced the section in controversy in this case. * * * But the right that the Indians held was only that of occupancy. The fee was in the United States subject

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to that right, and could be transferred by them whenever they chose." *Beecher v. Wethersby*, 95 U. S. 525.

It has been uniformly held by the supreme court that the Indian title was but a right of occupancy, the fee remaining in the United States. *U. S. v. Cook*, 19 Wall. 592; *Johnson v. McIntosh*, 8 Wheat. 574; *Worcester v. Georgia*, 6 Pet. 580; *Cherokee Nation v. Georgia*, 5 Pet. 48; *Fletcher v. Peck*, 6 Cranch, 142; 1 Kent Com. 259.

And unless there is a clear and explicit provision in the treaty, showing that the government intended to make a grant in fee simple, the court will not presume a new departure has been made, or that a different policy from that pursued in the past was intended.

Now, there is but little in this treaty to justify the court in finding a grant made or intended to be made to the allottees.

It was undoubtedly the desire of the government to induce the Indians to adopt the modes and habits of civilized life whenever it could be accomplished, and as a step in that direction, the plan of allotment in severalty to those of the tribe who had adopted the customs of the whites, and were willing to abandon all claims to the common lands and funds, was adopted.

It was optional with the adult Indian to have his land in common with the tribe, or to have it allotted to him in severalty; the head of the family choosing for the minor children, and the agent for orphans and those of unsound mind.

It further provides that certificates shall issue to the allottees for the tracts assigned in severalty, specifying the individuals to whom they had been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of said assignees and their heirs.

The allotted lands were exempt from taxation and sale, and were not alienable by the allottee. That the contracting parties to this treaty did not regard the fee as becoming invested in the allottee by virtue of article two, and the certificate issued in pursuance thereof, is demonstrated by the next article, for

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it is therein provided how the adult allottees may obtain that title.

It provides in substance that when he should make it appear to the United States district court that he had adopted the habits of civilized life, and that he was sufficiently intelligent and prudent to control his own affairs, and take the oath of allegiance, etc., he could then apply to the president of the United States for a patent, and the president, on being satisfied that he was competent to control his own affairs, might cause the lands to be *conveyed to him by patent in fee simple with power of alienation*; and when the patent was made and the fund distributed, the patentee became a citizen of the United States and ceased to be a member of the tribe, and the lands were subject to taxation, sale, etc.

That the contracting parties anticipated that these allotments would ultimately ripen into perfect titles through the proceedings specified in article three, is altogether probable; but that event might or might not happen.

If the intention of the grantor is the controlling consideration in construing this treaty, as decided in *Rice v. Railroad Company, supra*, what better evidence is needed of that intention than the treaty of 1867, which was assented to and approved by the Pottawatomies themselves?

The fourth and sixth articles of that treaty are quite inconsistent with the idea of a grant *in presenti* under the former treaty.

The principal object of the treaty of 1867 was clearly to cause the removal to the Indian Territory of such of the tribe as had not and would not become citizens.

Article 4 required a registry to be made under the control of the agent, showing the names of all members of the tribe who desired to remove to the new reservation, and of all who desired to remain and become citizens.

Now under the former treaty, the head of the family may have become a citizen and received a patent for his land, and

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was no longer a member of the tribe, while his minor children, and perhaps his wife, were still members of the tribe, without provision for severing that relation. So it resulted that he could not elect to go to the new reservation, while his family might. Here was a capital opportunity for this unnaturalized female, the mother of this unregenerated brood, to assert the doctrine of woman's rights, and lead them all off to the Indian country, leaving the newly fledged male citizen the victim to his vaulting ambition to taste the fruits of civilization and become a white man. This peculiar situation called for some relief, and hence the provision in the sixth article making the whole family citizens in cases where the head had or should become a citizen.

Why the patent should be issued to him for all the land allotted to his family is not so apparent.

But they were then all citizens of the United States and no longer Indians. They had passed from the tutelage and control of the government, and become invested with all the privileges of other citizens. What was to be done with the title to their lands? Should the government hold it until they became of age or make conveyance directly to the minor allottees; or place it in the head of the family?

The head of the family had established his ability to manage his own affairs and had become a citizen, and who was more suitable to take this title than the natural guardian of the allottees?

I can see no reason why the United States and the Pottawatomie Indians, having the undoubted right to make provisions in the treaty of 1861, allotting these lands in severalty and for patenting the same as provided therein, had not the same right and power to amend that treaty, and provide for transferring the legal title to the parent or guardian of the allottee.

This being an action in ejectment, the paramount legal title must control, and it is not necessary at this time to decide whether the patentee took the title in trust for the allottee, or

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in what manner the trust, if any, could be properly executed, or whether notice thereof should be imputed to the purchaser of the legal title.

Judgment must go for the plaintiff.

DILLON, *Circuit Judge*, concurring.

FARMERS' LOAN AND TRUST COMPANY v. THE ST. JOSEPH
& DENVER CITY RAILROAD COMPANY and others.

(*District of Nebraska. May, 1880.*)

1. **LEASE—PART PERFORMANCE.** — A lease which has not been reduced to writing, but has been acted upon and partly performed, will be considered as binding as if signed.
2. **SAME—ULTRA VIRES—RATIFICATION BY STOCKHOLDERS.**— Under section 152, p. 204, statutes of Nebraska, a railroad company in that state cannot make a valid lease of its property and franchises for the term of its charter, without the same being ratified by its stockholders; but when the same have been used for a time under such void agreement, the company, or those representing it, may recover a just compensation for the use of such property during the time it is so used.

In the matter of the petition of the Burlington & Missouri River Railroad Company in Nebraska.

J. M. Woolworth, for Burlington & Missouri River Railroad Company in Nebraska.

John Doniphan and *A. J. Poppleton*, for William Bond, receiver of St. Joseph & Denver City Railroad Company.

McCARY, *Circuit Judge*.— Prior to the commencement of this cause the defendant company had leased from the Burlington & Missouri River Railroad Company in Nebraska so much of its road as lies between Hastings, Nebraska, and Kearney, Nebraska, including road, track, depots, and other

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property. The contract here called a lease will be referred to more particularly hereafter.

In the present suit (being a bill to foreclose a mortgage upon the road and property of the defendant company) a receiver was appointed, who continued to use said road between Hastings and Kearney, under the terms of said lease, until January 1, 1876.

The said Burlington & Missouri River Railroad Company in Nebraska petitions the court for an order on the receiver to pay certain balances claimed as due under said lease, and it is upon this petition that this case is now before me. The claim of the petitioner is admitted by the receiver except one item, to wit: a claim of \$17,164.95, for depreciation or wear and tear of the road during the time it was used by the lessee.

The lease was not signed, but having been reduced to writing, acted upon, and partly performed by both parties, it must be considered as binding as if signed. By its terms it was to continue in force during the life of the charter of the said Burlington & Missouri River Railroad Company in Nebraska, and this, it is claimed, made it a lease in perpetuity. Whether this be true or not, the stipulated term was for a long period.

It is insisted on behalf of the receiver that the contract or lease was *ultra vires*, and void. By the revised statutes of Nebraska, § 152, p. 204, it is provided that "any railroad company * * * may mortgage or lease, sell or convey, the whole or any part of its railroad situated within this state, and the rights, privileges and franchises connected therewith, and other property pertaining thereto, to any person or persons, on such terms and conditions as may be agreed upon. * * * * * *Provided, however,* that no sale or purchase shall be made of a railroad situated within this state, of companies without this state, or consolidations effected as provided in this act, until the terms of such sale or consolidation shall have been approved by a majority of the stockholders in

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interest, in person or by proxy," etc. It does not appear that the lease in question was approved by the stockholders, and it is therefore insisted that it is void under this proviso. It will be observed that the authority to lease is given in terms by the section quoted, while the proviso, in expressing the limitation upon that power, uses only the words "sale," "purchase," and "consolidation," omitting the word "lease." Unless, therefore, the contract in question amounted by its terms, upon a fair construction, to a sale by the Burlington & Missouri River Railroad Company in Nebraska "of the whole or any part of its railroad," and the rights, privileges and franchises connected therewith, the limitation does not apply.

The statute must be held to apply to the transaction in its essence. If a sale is made under the name of a lease or of a consolidation, it must be held to be within the proviso above quoted. That the contract in question, if given effect, amounted to a sale of a part of the railroad, and of the rights, privileges and franchises connected therewith, there can be no doubt. It was, in effect, a sale of one-half of the road, with all its privileges, between Hastings and Kearney, being by its terms a transfer thereof for the whole period of the grantor's charter. It would be impossible, consistently with the plainest rules of construction, to hold that under this instrument no part of the property or franchises of the lessor was intended to be sold. The contract must, therefore, be held unauthorized and invalid, unless it can be shown that it was ratified by the stockholders as required by the statute. It devolved upon petitioner to show such ratification. If it be claimed that this can be shown, I will give the petitioner the opportunity to show it, by directing a master to take proof and report upon that question. But if, as I suppose the fact to be, there was no such ratification, my decision is that nothing can be recovered upon the contract as such.

But inasmuch as the transaction is not tainted with any immorality, I hold that the petitioner is entitled to recover, without regard to the contract, a just compensation for the

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use of its road and property during the time in controversy. And if the petitioner is content to take decree for the sum recommended by the master, less the disputed item for depreciation of property, an order may be made accordingly. If this is not accepted, the case will be sent to a master to take further testimony and report what would be a reasonable compensation for the use of the property during the period in question, including the depreciation caused by such use. In the event of such reference, the question of the effect of the receiver's admission of certain items as due under the contract will be reserved.

PATRICK v. LEACH and others.

(District of Nebraska. May, 1880.)

1. COVENANTS OF WARRANTY — DEFENSES.—In an action for breach of covenant of warranty, the defense that the covenant sued upon was a joint one, and that it was sued upon as several, can be made under an answer denying there is anything due.
2. DEED — STATEMENT OF CONSIDERATION.—The statement of the consideration in a deed is *prima facie* only, and may be rebutted.
3. SAME — ESTOPPEL — WASTE.—One who has given a deed of lands with covenants of warranty is estopped from denying that the grantee is the owner, and cannot complain of waste committed by such grantee.
4. WARRANTY — COVENANT — DAMAGES.—In an action for breach of covenant of warranty the measure of damages is the consideration money, with interest.

J. M. Woolworth, for plaintiff.

J. C. Corwin and *John D. Howe*, for defendants.

MCCRARY, *Circuit Judge*.—Bill in equity seeking to recover judgment for damages for breach of a covenant of warranty in a deed of real estate, and for an accounting, to the end that the sum recovered may be set off against a certain judgment held by defendant David Leach against plaintiff.

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Defendant asks leave to amend his answer by alleging the following facts:

First. That the warranty deed upon which plaintiff sues was not the deed of David Leach alone, but the joint deed of David Leach and Jane E. Leach, his wife. The latter is not joined. The original answer is in effect a denial of the right of plaintiff to recover, and it is not necessary for defendant to plead specially that the covenant of warranty was joint, and not joint and several.

The plaintiff must make out his case, and the defense now sought to be specially pleaded can be insisted upon under the pleadings as they stand. If the plaintiff is not entitled to recover on the covenants in the deed sued on, when he comes to offer it in evidence that defense can be made. It is not necessary to consider now whether the husband can be sued alone upon a covenant of warranty contained in a deed executed by him, jointly with his wife, and for the conveyance of the wife's separate property. I hold that, if the proof shall show the facts to be as claimed, the defense can be made under the answer which alleges that there is nothing due the plaintiff on the covenants sued on.

Second. Defendant asks leave to amend by pleading that the consideration for the deed sued on was only \$2,000, and not \$77,000, as alleged. The real consideration may be shown under the pleadings as they stand. The sum named in the consideration clause of the deed is only *prima facie*, and not binding on either party. Defendant may show that the consideration was less than the sum named. Rawle on Covenants, 258, 259.

Third. It is proposed to amend the answer by alleging that while the land conveyed by the warranty deed was in possession of plaintiff, under defendant's warranty deed, he committed waste upon the same. This, if shown, would constitute no defense to a suit to recover damages for breach of the covenant of warranty.

It is now well settled that the measure of damages in such

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a suit is the consideration money and interest, and that the recovery is not to be increased by an increase in the value of the land, nor diminished by a decrease in such value. The parties are to be regarded as having fixed the measure of damages when they agreed upon the value of the land at the time of the sale. Rawle on Covenants, 235, 236, 237 *et seq.*; 6 Wheat. 118. Besides, as between plaintiff and defendant Leach, the land was the plaintiff's, and he was at liberty to do as he pleased with it. He held it under warranty deed from defendant, who is estopped from saying that notwithstanding his conveyance he still owned or was interested in the land conveyed so as to be entitled to sue and recover for waste committed upon it.

The motion for leave to amend is overruled.

ANDRESSEN and others v. THE FIRST NATIONAL BANK OF
NORTHFIELD.

(District of Minnesota. April, 1880.)

1. **BILLS OF EXCHANGE — ACCEPTANCE.**— Any act clearly indicating an intention to comply with the request of the drawer of a bill of exchange, as paying part in cash, and issuing certificate of deposit for the balance, will constitute an acceptance.
2. **SAME — SAME — REVOCATION OF ACCEPTANCE.**— After a bill of exchange has been received, and the proceeds credited to the payee, who presents it, the drawee cannot thereafter, by arrangement with the payee, revoke such acceptance and hold the drawer.
3. **SAME — REPAYMENT BY DRAWER OF ACCEPTED DRAFT.**— Repayment of a draft in this case by the drawer, having been made in ignorance of facts showing an acceptance by the drawee, it cannot be regarded as voluntary, and the amount thereof may be recovered from such drawee.

Action at law, tried before the court without a jury.

Cameron, Losey & Bunn and *Geo. L. & Chas. E. Otis*, for plaintiffs.

Perkins & Whipple and *Gordon E. Cole*, for defendant.

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NELSON, *District Judge*.—This suit is brought to recover from the defendant \$2,728.49, with interest from October 1, 1878.

The trial is before the court without a jury, and the following are the facts:

The plaintiffs, citizens of the kingdom of Norway, are bankers, doing business at Christiania. The firm of Wilson & Jurgens, bankers in the city of La Crosse, Wisconsin, and the correspondents of the plaintiffs, sent to them a printed list of their correspondents in this country, among whom was the defendant, and authorized the plaintiffs to draw drafts on them, to be paid on account of Wilson & Jurgens.

The plaintiffs drew a draft as follows:

"For \$2,724.87, gold. CHRISTIANIA, 16th August, 1878.

"Three days after sight pay this first of exchange (second unpaid), to the order of Mr. Ole Mikkelsen, two thousand seven hundred and twenty-four dollars and eighty-seven cents, gold, value received, and place it to account of W. & J., without or as per advice from.

"N. A. ANDRESSEN & Co.

"To the First National Bank, Northfield, Minn.

"In need with Messrs. Wilson & Jurgens, La Crosse."

The First National Bank, Northfield, had no funds of the plaintiffs, and was unknown to them, except as included among the correspondents of Wilson & Jurgens.

Ole Mikkelsen, the payee in the draft, presented it to the drawee September 7, 1878, and an officer of the bank said it was all right, received it, paid \$24 upon it, issued a certificate of deposit to the payee for the balance, and made the following entries in the bank books:

	Debit.	Credit.
September 7, 1878. Certificate of deposit in favor of Ole Mikkelsen, No. —,.....		\$2,700 00
September 7, 1878. Cash paid.....		24 87
September 7, 1878. Wilson and Jurgens, draft forwarded for collection.....	\$2,724 87	
September 9, 1878. Draft was intercepted and handed to Batavia Bank, La Crosse, for protest.		

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	<i>Debit.</i>	<i>Credit.</i>
September 10, 1878. Certificate of deposit withdrawn and cancelled, and receipt given for collection.		
W. & J. draft returned.....		\$2,724 87
Certificate deposited, account cancelled.....	\$2,700 00	
Bills receivable, Mikkelsen note..	24 87	

The draft was sent to Wilson & Jurgens by the First National Bank, with a request to send gold draft on New York for amount, and on discovery of Wilson & Jurgens' bankruptcy, it was subsequently intercepted at La Crosse, and the Batavia Bank, having no interest in it, caused it to be protested at the instance of the First National Bank of Northfield.

The plaintiffs had ample means, some \$4,500, on deposit with Wilson & Jurgens, when this draft was drawn. On August 29, 1878, Wilson & Jurgens were adjudged bankrupts. Their assets were in the hands of an assignee at the time the draft was presented for payment by the Batavia Bank.

The draft was returned to Andressen & Co., with the protest, and the following letter from Ole Mikkelsen:

"NORTHFIELD, Sept. 18, 1878.

"*Messrs. N. A. Andressen & Co., Christiania:*

"DEAR SIRS — The draft, \$2,724.87, I bought from you on the sixteenth of August, has been protested on the ground that Messrs. Wilson & Jurgens, of La Crosse, became insolvent. I return this to you through the First National Bank of this city, and Messrs. Knauth, Machod & Kuhne, of New York, for collection.

"I have bargained for a farm here, and hope there will be no delay in collecting the amount of the draft.

"Yours, etc.,

OLE MIKKELSEN."

The plaintiffs, believing that the defendant had not paid the draft as it asserted, and that Wilson & Jurgens had not been able to pay on account of insolvency, when returned to them, paid it.

On discovering, from a correspondence with the assignee in

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bankruptcy and others, the facts, suit is brought to recover from defendant the amount paid.

The draft on its face indicated that it was drawn for the account of Wilson & Jurgens, and if not paid for any reason by the drawee, the holder could apply to Wilson & Jurgens for payment.

Defendant was not authorized to pay for the account of the drawers.

The directions being clear, the defendant, under the facts as found, could not pay the draft and charge the drawers.

The facts proved establish an acceptance of the draft, charging Wilson & Jurgens with the amount; issuing to the payee, with his consent, a certificate of deposit for all but a small portion, which was paid in money. This was a payment as to the drawers, and when thus made cannot be revoked by the drawee so as to charge them.

Any act which clearly indicates an intention to comply with the request of the drawer will constitute an acceptance, and when the draft is received, and the proceeds credited to the payee, who presents it, the drawee cannot, by a subsequent arrangement with him, cancel the payment and hold the drawer.

It is true, a certificate of deposit is not in law an extinguishment of a debt or payment, unless there was an agreement to so accept it.

In this case the evidence shows that Mikkelsen authorized the deposit of the balance of the proceeds of the draft not paid to him in cash, to his credit, for his benefit. The uncontradicted evidence of Mikkelsen is: I presented the draft and they said it was all right. They asked if I wanted it right away. They paid \$24 or \$25, and gave me a note for the money I left." Had the First National Bank failed immediately after this certificate was issued and received by Mikkelsen, the loss would have been his; so that, even as between Mikkelsen and the bank, the certificate, whatever its form as to time when due, was a payment of the draft.

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The subsequent payment by the plaintiffs on the return of the draft, protested, was made without full information of all the facts, and the effect of the letter of Mikkelsen was to mislead them. A payment thus made is not voluntary, and the amount can be recovered.

Judgment for plaintiffs.

ADLER and others v. ECKER, defendant, and BOOTH, garnishee.

(District of Minnesota. —, 1880.)

1. ASSIGNMENTS — RIGHT TO CONTEST.— Assignments for the benefit of creditors in the state of Minnesota are simply regulated by statute. The assignee is mere trustee, and the legality of the assignment may be contested by a creditor in the federal court.
2. SAME — FRAUDULENT INTENT — HOW SHOWN.— The validity of an assignment for the benefit of creditors, as affected by fraudulent intent, is to be determined by the intent of the assignor, and his contemporaneous fraudulent acts are evidence of such intent.
3. SAME — FRAUD.— Facts in this case *held* to show a fraudulent intent on the part of the assignor, and the assignment void.

Rogers & Rogers, for plaintiffs.

Young & Newell, for defendant and garnishee.

NELSON, *District Judge*.— Suit was brought by plaintiffs against Otto Ecker, and judgment recovered. Garnishee proceedings were commenced against N. R. Booth, to whom Ecker had made an assignment for the benefit of creditors. After disclosure by the garnishee, a supplemental complaint was filed by permission of the court, under the statutes of the state of Minnesota, and it is charged that Ecker made the assignment to Booth to defraud creditors.

The questions presented for consideration are: *First*. Can this court entertain a suit against the assignee, Booth, who has given a bond to faithfully fulfill his trusts, and is amenable

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to the state court, by virtue of the statutes of the state of Minnesota regulating proceedings under assignments for the benefit of creditors? *Second.* Is the assignment to Booth fraudulent and void as to Ecker's creditors?

There is no law of the state authorizing assignments for the benefit of creditors, but such conveyances are recognized and regulated by the statute for better security. The assignee is selected by the assignor, and can only be removed for such dereliction of duty as would subject him to removal by a court of equity. In fact, the statutory enactment to this extent is declaratory of the jurisdiction of a court of chancery over trustees, among whom are assignees under voluntary conveyances for the benefit of creditors.

The property in possession of such assignee is not *in custodia legis*, for the assignee is not an officer of the state court, but a trustee, subject to statutory provisions compelling him to execute his trust according to the terms prescribed by the assignor in the conveyance. The authority of the assignee depends upon the validity of the assignment, and is not conferred by the court. The right of a creditor or other person interested to contest the legality of a voluntary conveyance in a court of competent jurisdiction, is not obstructed by the law prescribing the manner of executing assignments made for the benefit of creditors.

A creditor having a standing in the federal courts can contest the validity of such assignment, and a state law cannot deprive him of it.

It remains only to determine whether this assignment was made with intent to delay, hinder and defraud creditors.

The only intent which will determine the validity of an assignment is that of the assignor, at the time it is made, and contemporaneous fraudulent acts are evidence of this intent.

It is in proof that Ecker being insolvent, and owing debts amounting to more than double the value of his assets, took from his business, within four weeks before his assignment, a sum equal to one-half of the value of the property assigned,

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and erected with it a building upon a lot owned by his wife, and within a short time thereafter joined with his wife in giving a mortgage upon this property to his father-in-law for three times the amount of any debt owing either by him or his wife, and this mortgage and accompanying notes were sent to the father-in-law without any request on his part or any information on the subject until the papers were received.

There is no evidence to counteract or explain why such mortgage was given for so large a sum, after one-fourth of his entire assets had been taken from his business in the manner above stated, and under circumstances calculated to show an intent to put a portion of his available means beyond the reach of his creditors.

I have arrived at the conclusion that the assignment is fraudulent and void, and must give judgment for the amount claimed, with costs, and it is so ordered.

THE MERCHANTS' NATIONAL BANK OF ST. PAUL v. McLAUGHLIN, Sheriff, etc.

(District of Minnesota. April, 1880.)

1. CHATTEL MORTGAGE — LOGS — SUFFICIENT DESCRIPTION. — A chattel mortgage of certain logs described them as being the northerly or rear 1,250,000 feet lying in a certain creek, and marked with a certain mark, to be ascertained by commencing at the rear or northerly end of said logs, and counting along said stream southerly until the requisite number was so counted and set apart. *Held*, sufficiently definite.
2. SAME — DEFAULT — RIGHT OF POSSESSION. — After default in the conditions of a chattel mortgage, the absolute right of possession is in the mortgagee.
3. LIEN HOLDERS — RIGHTS OF. — Where there are two funds, to both of which a prior lien holder may resort, while a junior lien holder can resort to but one, the former must first enforce his claim out of the fund to which the latter cannot have recourse.
4. CONFUSION OF GOODS — INNOCENT MORTGAGEE. — An innocent mortgagee will not be compelled to suffer by reason of the wrongful confusion of the goods by the mortgagor.

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Cause tried before the court without a jury.

Geo. L. & Chas. E. Otis, for plaintiff.

I. V. D. Heard, W. H. Grant and Wilson, Lawrence & Rogers, for defendant.

NELSON, *District Judge*. — This action is brought against the defendant sheriff to recover damages for the conversion of personal property, consisting of logs, and lumber manufactured therefrom.

The sheriff defends under a seizure by virtue of certain writs of execution issued upon judgments obtained against the firm of McCaine Bros. & Barteau, and also sets up proceedings instituted by laborers in the employment of this firm, as lien claimants under the laws of the state of Minnesota.

Briefly, the sheriff, in his answer, says the logs and lumber were not the plaintiff's property, and were not in its possession or under its control, but were owned by McCaine Bros. & Barteau; and that executions came into his hands against said firm, and that he had levied upon the logs and lumber as their property.

The plaintiff claims the right to the possession of the property by virtue of a chattel mortgage, and on default of the mortgagor to pay the money secured thereby.

The mortgage is in the form usual in this state. It is a sale of certain logs with conditions, and, in case of default, the mortgagee had the right to take possession and sell, subject to redemption by the mortgagors. It is executed by McCaine Bros. & Barteau to the plaintiff. It acknowledges an indebtedness to the plaintiff of \$3,000; and, for the purpose of securing this indebtedness, grants, bargains, sells and mortgages the property described therein as follows: "All, and singular, such, and so many, of all those certain logs belonging to said parties of the first part, now lying and being in the north fork of Grindstone creek (so-called), in the town of

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Hinckley, county of Pine, and state of Minnesota; and being those certain logs now lying in and along said stream, ready to be driven out when the stage of water will permit, and marked 1 y 1 [read notch y notch], as are described and designated, as follows, viz.: The northerly, or rear, one million, two hundred and fifty thousand (1,250,000) feet of said logs, to be ascertained by commencing at the rear or northerly end of said logs, as the same are situated in the said north fork, as aforesaid, and running along said stream in a southerly direction, and taking, counting, and including all of said logs until the full number of 1,250,000 feet thereof shall have been so counted, taken and set apart; the logs so counted and ascertained to be the logs covered, and intended to be covered, by and included in the mortgage." The usual condition of defeasance upon payment precedes the following covenants and agreements: "It is hereby mutually covenanted and agreed, between the parties hereto, that if default shall be made in the payment of said sum of money, or any part thereof, or the legal interest thereon, at the time or times when, by the conditions aforesaid, the same shall become payable; or if any attempt shall be made to remove or dispose of said property, or any part thereof, by the said parties of the first part, or any other person; or if the said party of the second part shall, at any time, deem itself insecure, that, thereupon and thereafter, it shall be lawful for, and the said parties of the first part do hereby authorize, the said party of the second part, its successors or assigns, or its authorized agent, to enter upon the premises of said parties of the first part, and any other place or places where the said goods and chattels, or any of the same, may be, and remove and sell and dispose of the same, and all of the equity of redemption of the said parties of the first part therein, at public auction, with notice, as by the statute in such case made and provided, and on such terms as said party of the second part, or its successors or assigns, may see fit, and out of the proceeds thereof to retain the amount which shall then be owing to the said party of the

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second part, as aforesaid, its successors or assigns, together with all reasonable charges, costs and expenses attending the same, rendering to the said parties of the first part, or their legal representatives, the surplus moneys (if any there shall be), after paying such mortgage debt, interest and costs, in full. And until default is made, as aforesaid, or until any attempt shall be made to dispose of or remove the same, or any part thereof, the said parties of the first part may continue in the peaceable possession of all the said goods and chattels; all which, in consideration thereof, they engage shall be kept in as good condition as the same now is, and taken care of at their own proper cost and expense."

It is insisted by the defendant that the mortgage is void for incompleteness and uncertainty in the description of the property mortgaged. There is no controversy about the delivery of the mortgaged property at the time the mortgage was executed. The law prescribing the record and filing of the mortgage was followed. The mortgagee never had possession of the logs. They were left in the river where the mortgagor had transported them.

Default was made in the payment of the money secured by the mortgage, and, by its terms, the right of possession was thenceforth in the plaintiff, and it can maintain this suit.

The only question presented is whether the logs are described and designated with such certainty as to enable third parties and creditors of the mortgagors to distinguish the property intended to be mortgaged and identify it.

If the property, or subject-matter, is described so that it may be identified by the terms of, or language used in, the mortgage, and other evidence admissible in such cases, it is sufficient. *Herman on Chat. Mort.*; *Pomeroy on Cont.* 226; 20 Wis. 187; 22 Wis. 134.

Until the mass of logs were intermixed and driven into the pond by the mortgagors, it was possible for the mortgagee to have taken possession of the specific quantity of logs described

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and located as the northerly or rear 1,250,000 feet of the logs lying in the north fork of Grindstone creek.

In the case of *Richardson v. Alpena Co.*, cited by defendant (8 Cent. L. J. 297), the particular logs mortgaged were not described or designated, in any respect, from the mass bearing the same mark. They were described as a given number of feet of logs, board measure, situated in a stream containing a very large quantity of the same mark, and it was impossible to tell from what part of the mass they should be taken. Here, the mortgage fixed the location of the particular logs, and furnished *data* for separating them. The written description identified specifically the property mortgaged. It was a transaction made in good faith, and the mortgage was duly registered. It was not necessary to measure or separate them by a boom, or other artificial boundary, in order to make the mortgage valid; nor were the logs required to be measured before the mortgage took effect. The clause in regard to "taking and counting the logs" makes the description more certain by furnishing *data* by which the location could be determined. A surveyor of logs, or person skilled in their mensuration, with the mortgage before him, going, at the time it was executed, to the Grindstone creek, and examining the logs in the north fork, could ascertain accurately the specific logs mortgaged, which is all that is required to make the mortgage sufficiently definite and certain.

There is some conflict in the evidence about the surrounding facts and circumstances. It is claimed the agent of the mortgagee agreed to permit the mortgagors to drive the entire lot of logs to their mill, and manufacture and sell them. The evidence, however, does not satisfy my mind that such was the understanding.

If I am right in my construction of the mortgage, then, manifestly, so far as the executions are concerned, the sheriff cannot hold the property by virtue of any rights of the judgment creditors as against the plaintiff. The absolute right of possession of the mortgaged property belonged to the plaintiff.

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iff on default by the mortgagors, which was prior to the seizure, by the sheriff, upon the executions. Authorities are numerous. See *Edson v. Newell*, 14 Minn. 228, and citations.

Can the sheriff avail himself of the rights which the statute gives certain laborers to secure liens and preferences for services performed? There is some doubt about the construction of the statute of Minnesota, and the nature of the proceedings necessary to establish and perfect the lien given by it. It is not necessary, in determining this case, to consider the rights of claimants under this statute. If the claim is an equitable one, then, conceding that the lien claimants, by serving notice upon the sheriff, did all that is necessary to preserve their liens under the statute, it cannot avail the sheriff to defeat the plaintiff's right to the property mortgaged. The money in the hands of the sheriff far exceeds the amount of plaintiff's claim, and the overplus is more than enough to secure payment for the services of the workmen, who urge prior liens under the statute; and, if it is admitted that these workmen have a first lien on all the logs cut, or lumber manufactured, including the logs mortgaged to the plaintiff, the lien not being upon any specific portion, the rule prevails that where there are two funds to which the other lien claimants can resort, while the plaintiff has only one of these, the former must enforce their lien on the fund to which the latter cannot have recourse.

This doctrine shuts out the defense set up under the statute. The sheriff cannot avail himself of his relationship to the claims of the workmen on the fund or money in his hands, for it is more than enough to pay them, and the plaintiff's rights are superior to those of the judgment creditors.

The logs were not intermixed with the consent of the plaintiff, and, the confusion existing on account of the wrongful acts of the mortgagors, the innocent party will not suffer thereby.

Judgment will therefore be entered in favor of the plaintiff.

Atwater v. Seely.

ATWATER and others v. SEELY and others.

SEELY and others v. ATWATER and others.

(District of Minnesota. ———, 1880.)

1. VOLUNTARY CONVEYANCE — EFFECT OF.— A voluntary conveyance, without consideration, will vest an absolute title in the grantee, subject only to the rights of creditors.
2. CURATIVE ACT — DEEDS.— The act of February 28, 1877 (Minnesota), legalizing deeds executed in another state according to the laws of such state, is a valid "healing statute," and as to a deed covered by it operated to validate the same, and pass the legal title, except as to intervening rights.
3. DEED — INSUFFICIENT TO PASS LEGAL TITLE.— A deed in Minnesota, executed in another state according to the laws thereof, but insufficient under the laws of the state where the lands are situate, will operate as a transfer of the equitable rights of the grantee.

Original and cross-suit in equity heard and submitted together, upon pleadings, proofs and arguments of counsel.

Charles A. Clark, for plaintiffs in original suit and defendants in cross-suit.

Davis, O'Brien & Wilson and *E. R. Hollinshead*, for defendants in original suit and plaintiffs in cross-suit.

NELSON, *District Judge*.— The original suit was brought to set aside a deed executed by Julinah P. Atwater to John D. Seely, Jr., dated April 19, 1875. The bill contains a prayer, also, that certain real estate therein described be partitioned among the owners, or sold, and the proceeds distributed according to the interest of the parties as alleged therein. A cross-bill is filed by the defendants, Seely and others, and affirmative relief prayed. The cases have been fully presented and argued upon the pleadings and proofs.

The controversy involves the title to real estate claimed by the complainants in the original suit, as heirs at law of Josephine Seely, and by the defendant John D. Seely, as the

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heir at law of her husband, John D. Seely, Jr.; the other defendant, Norman G. Seely, being administrator of his estate.

The testimony is voluminous, and discloses a very bitter feeling on both sides.

The following facts are established by the proofs, and I so find: On August 12, 1873, John D. Seely, Jr., and Josephine, his wife, were in possession and seized in fee of the northwest quarter of section fourteen (14), township one hundred and seven (107), range twenty-one (21) west, situated in the county of Steele, Minnesota, and on that day, by warranty deed, they conveyed these premises to Julinah P. Atwater, a sister of Josephine Seely, for the consideration expressed in the deed of \$6,000, when in fact no consideration was paid at the time of the conveyance, or ever has been, but the deed was executed and delivered from apprehension of a slander suit against John D. Seely, Jr., by one Prisley, and to prevent a lien of any judgment obtained in that suit. I also find that John D. Seely, Jr., made an attempt to create a secret trust for his benefit; and I further find that on October 14, 1873, Julinah P. Atwater, at ———, in the state of New York, by a quit-claim deed of the real estate above described, executed in accordance with the laws of the state of New York, conveyed the real estate in controversy to Josephine Seely, and the deed was delivered to and received by her, but was not so executed as to admit it to record according to the laws of Minnesota, then existing, for the reason that there were no witnesses to the signature of the grantor; that this deed remained in the possession of Josephine Seely and her husband after its delivery, and no effort was made to have any correction in the form of the same, or demand made for a deed to be executed in conformity with the laws of Minnesota, until after the death of Josephine Seely, which occurred April 14, 1875, when, upon the request of John D. Seely, Jr., a warranty deed was executed and delivered by her to him of the same premises, April 19, 1875, without any consideration passing therefor, which deed was recorded September 6,

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1875, after the death of John D. Seely, Jr., occurring in July, 1875.

I find that John D. Seely, Jr., and Josephine, his wife, left no issue by their marriage.

I also find that an act was passed by the legislature of the state of Minnesota, approved February 28, 1877, as follows: "*Be it enacted* —

"Section 1. That all conveyances of real estate in this state, or of any interest in such real estate heretofore executed in any state or territory of the United States, if executed and acknowledged according to the laws of such other state or territory, are hereby legalized and made valid, and may be recorded to the same extent and for the same purposes as though the same had been executed in accordance with the laws of this state: *Provided*, that before such conveyance shall be entitled to record the party presenting such conveyance for record shall also present for record the certificate of the clerk, or other proper certifying officer of a court of record of the county or district within which such acknowledgment was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that he believes the signature of such person subscribed thereto to be genuine, and that the conveyance is executed according to the laws of such state, territory or district; and all such conveyances are hereby declared to be legal, and valid, and effectual, to all intents and purposes, and the record thereof shall have the same effect as in other cases authorized by law: *Provided, however*, that nothing herein contained shall, in any manner, affect the rights or title of any *bona fide* purchaser, without notice, for a valuable consideration, of any such real estate prior to the passage of this act."

On July 4, 1877, the quit-claim deed from Julinah P. Atwater to Josephine Seely, dated October 14, 1873, was filed for record in the office of the register of deeds of Steele county, aforesaid, and duly recorded.

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The deed executed August 12, 1873, by John D. Seely, Jr., and Josephine, his wife, to Julinah P. Atwater, conveyed and passed the legal title of the real estate therein described, subject only to the rights of the creditors of John D. Seely, Jr.; and Julinah P. Atwater, by virtue of this deed, had full control over the estate, and could dispose of it in such manner and to whom she pleased, the grantee taking by any conveyance from her the title subject to the rights of the creditors aforesaid. 1 Story Eq. Jur. § 61, note 371, 428; 8 Minn. 309; 12 Minn. 60, 67, and cases cited; 2 Sug. Vendors, 436, and authorities.

The quit-claim deed from Julinah P. Atwater to Josephine Seely, executed October 14, 1873, and delivered, was a nullity as a deed, and did not convey the legal title, but did pass all of her equitable interest.

The act of the legislature approved February 28, 1877, is a "healing statute," and cured all defects in the deed which prevented its record, and after its passage the deed was entitled to be recorded in the register's office of Steele county.

This act of the legislature is remedial in its character, and the deed, when recorded, conveyed the legal title to the real estate, unless vested rights of third persons intervened.

The "healing statute" was confined to validating acts which the legislature might have authorized previous to the execution of the deed, and divested legal rights in a case where the equitable rights were superior, and both did not concur in the same person. Such legislation is constitutional and valid. The legal rights affected by the statute were deemed to have been vested, subject to the equity existing against them, which the statute recognized and enforced. 1 Kent (6th ed.), 455-56; Cooley Const. Lim. 357, 371-77. The heir has no rights superior to those conferred upon John D. Seely, Jr., by virtue of the deed executed and delivered April 19, 1875, and recorded September 6, 1875. He succeeded, on John D. Seely, Jr.'s death, to such interest in the real estate as the latter had at the time of his death, and such only. This interest or title in

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the heir was subject to the equity created by the conveyance from Julinah P. Atwater to Josephine Seely, dated October 14, 1873, and he took the title *cum onore*. 2 Pet. 380; 8 Pet. 108; 13 Mich. 217; 11 Minn. 439; 23 Minn. 84.

By the deed to John D. Seely, Jr., executed April nineteenth, 1875, Julinah P. Atwater conveyed all the interest in the real estate which she became possessed of as one of the heirs of Josephine Seeley, and she has parted with all her right, title and interest in the same, and it cannot be recovered by these complainants. They are, however, entitled to the relief demanded, with this exception, and to the possession of two-thirds of the real estate, less the interest of Julinah P. Atwater, as one of the heirs of Josephine Seeley, and a decree is ordered in conformity with this opinion.

The matter is referred to H. E. Mann, master in chancery, to take an account as prayed for, and also report to the court the condition and situation of the property, so that it can determine whether the real estate should be partitioned among the parties entitled thereto, or sold and the proceeds divided.

The cross bill is dismissed.

BOYD and others v. BOYD and others.

(District of Minnesota. —, 1880.)

1. WILL — CODICIL — CONSTRUCTION. — A testator is presumed to have used words in their natural sense, and where he has attached a codicil to his original will the two are to be construed together, and the will is not to be regarded as revoked by the codicil unless such appears to be the intention.
2. SAME — SAME. — Certain specific devises in a will held not to have been revoked by a subsequent codicil.

Suit to quiet title.

Lamprey & James, for plaintiffs.

Henry J. Horn, for defendants.

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NELSON, *District Judge*.—This suit was brought under the statutes of Minnesota to quiet the title to certain real estate situate in the county of Ramsey, in said state. The fee of the land was in the defendants' testator at the time of his decease, and had been since the year 1855. The plaintiffs claim title by gift from the deceased, and that possession was given to them, without a deed, in 1855; also by devise under a holographic will executed by their testator May 26, 1856, in Adams county, in the state of Mississippi. The defendants set up title under the same will, and a codicil thereto executed September 10, 1862. The case is put at issue by proper pleadings, and is submitted to the court without a jury.

The defendants prove their title by will, which is met by opposing title of plaintiffs attempted to be shown as before stated by gift, and also by adverse possession under the statute of limitations, and finally by special devise under the will through which the defendants claim.

It is urged by the defendants that the special devise in the will of the land in controversy to the plaintiffs is revoked by the codicil. If it is not, then there can be no doubt about the plaintiffs' title. The following is the will and codicil:

"I, Samuel S. Boyd, of the county of Adams, and state of Mississippi, do make, ordain, and publish this my last will and testament, revoking all others, and this being all in my own handwriting and containing ten pages of manuscript:

"1. I direct my whole estate existing at the time of my decease—real, personal and mixed, private and partnership—to be kept together, managed, controlled, disposed of, and distributed as hereinafter directed.

"2. I give to my beloved wife and children the use of my Arlington property in Natchez, or such other dwelling house as may be our usual family residence at the time of my death, to be so held during the life of my said wife, at all events, and after her death for the use of such of our children as may survive her, until such survivor or survivors marry or arrive at the age of twenty-one years. With such residence I include

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all the furniture, carriages, horses, servants, and other things appertaining thereto, and in the ordinary use of the family. So far as the children are concerned, this right to cease as each arrives at the age of twenty-one years or marries. And for the support, education and maintenance of my said family, under this clause of my will, as well as for keeping up said establishment, I direct my executor, hereinafter named, to apply a gross sum not exceeding \$10,000 per year, and an additional sum not exceeding \$2,000 per year for the sole and separate use of my wife, all without accountability or charge to them on the final settlement of my estate, and to come out of the income or profits of my estate. It is also my desire and intention that my beloved sisters-in-law, Ann and Maria Wilkins, remain in the use of said residence as long as any of the family occupy it under this clause of my will.

"3. As each of my children become of age (twenty-one years) or marry, I direct the above allowance of \$10,000 to be diminished \$2,000 per year, and so also should any of them die.

"4. As each of my children become of age or married, I give to such child the sum of \$50,000, to be invested by my executor in productive property — land and slaves preferred — for the sole and separate use of such child forever; but if such child should die without issue surviving, then and in that case this devise to return to my estate and be distributed as hereinafter directed.

"5. The investments and disbursements hereinbefore directed are to come from the income and profits of my estate; that is — *First*, from the income and profits of my private and individual estate; and, *secondly*, from the income and profits of my partnership estates, as hereinafter named and indicated; and in the last case, whatever amount is taken from the proceeds of the partnership property, a like amount is to be deducted and transferred to the private and individual account of the surviving partner.

"6. It is the understanding and agreement between me and

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my partner, Rice O. Ballard, that the planting partnership alluded to above shall be continued, notwithstanding the death of either partner, for the period of twelve years from the first of January, 1856, in the same way and with the same force, authority and right in the survivor as if both were living; and I therefore direct that at that time, or as soon thereafter as all the partnership debts are paid, the whole of our said partnership as it may then exist, and wherever it may be, shall be divided into two equal parts, any necessary inequality to be made equal by money, and the part then belonging to my said estate and to my said partner, or his estate, if he be dead, to be ascertained by lot; and thereupon I direct all my property, of all kinds and descriptions, be divided into as many equal parts or shares as will correspond to the number of my surviving children and wife, counting my wife as a child for this purpose, and my said estate I give and bequeath to them in said shares, the share of each to be ascertained by lot, each share being made equal to the other, as in the above case, and each to have an equal share thereof, as aforesaid, in absolute estate and forever, my wife included. Should any of my children die before said distribution is made, leaving issue surviving at the time of said distribution, then such issue are to take the place of such deceased child; and after said distribution, should either of my said children die leaving no issue surviving, I direct that the share of such child shall be distributed equally among the surviving brothers and sisters of such child.

“7. In order that my said partner surviving me may be freed from embarrassment in the management of our partnership affairs till the time of the aforesaid division, I state that he has full power as survivor, without regard to any power as executor, to manage and control all our partnership property and effects, and the proceeds thereof to invest in further purchases of any kind for the benefit of our said partnership, and to increase and extend the same, and to manage and dispose of

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the same, and to sell or exchange any portion thereof, if deemed most advantageous by him for the benefit of our said partnership, as we could do if both were living, it being my preference that land and slaves be preferred in purchasing, especially in regard to the proceeds of any sales of land or slaves by my said partner.

"8. In regard to the division of said partnership property between said Ballard and my estate, I direct the probate judge of Adams county, for the time being, under his private seal, to nominate one judicious and disinterested person, who shall act with such other as may be appointed by and on behalf of said Ballard, or his estate, in making said division, and should they not agree, then the two to select a third man as umpire, and the conclusion thus arrived at, in either way, shall be final. In regard to the division herein provided for of my estate among my children and wife, I direct my executor to make a like selection of suitable persons to make the same. In regard to both of said divisions, I mean and intend by the above to include the appraisement of the shares, as well as the actual process of division by lot.

"9. I appoint my friend Rice C. Ballard my executor, with full power to carry into effect each and every clause of my will, and to manage and employ for the benefit of my estate all my property, and the income thereof; to invest the same and the proceeds thereof, and to sell or exchange any part thereof, and to re-invest the same as he may deem most advantageous to my said estate; and such sales, purchases and investments he may make publicly or privately, and with or without any order of court, as he may prefer. He may settle, adjust and compromise all claims and demands against me or my estate, but not to pay any money demanded barred by the statute of limitations, unless he knows the same to be due and correct; and to assist him in the proper performance of his duties, I request my friend Alexander Montgomery to advise freely with him, with my family whenever called on, and in

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case of the death of said Ballard before the full execution of the trusts herein, I appoint him my executor, with like powers as are given to said Ballard.

"10. I appoint my beloved wife guardian to my children, and direct that she give no bond as such guardian; nor shall said Ballard, as executor or surviving partner, nor said Montgomery, should he become my executor, be required to give any bond or security.

"11. As I now have, and expect to have, property in several states, and have made my will in a spirit of impartial justice and equal kindness to all interested in my estate, I direct that if my wife or children, or either of them, refuse to abide by said will, then such one or more refusing shall have no part of my estate, except what is in the state of Louisiana, and such share in that estate as the law will give them alone, and the final division of my estate is to be made accordingly, and the provisions of my will carried out in all respects.

"12. Three years after my decease I give to my wife the sum of \$50,000, if she desire it, which is to be invested by my executor for her sole and separate estate forever, land and slaves preferred, and thenceforth the allowance of \$2,000 provided for her annually in the second clause of this will is to cease, and the amount herein given is to come out of the income and profits of my estates.

"13. By way of exception to the sixth clause of this will, I give to my brothers Edward and Walter my lands on which they reside in Minnesota territory; and to my brother R. S. Boyd, I give my interest in the estate of my father belonging to me to assist him in purchasing the family mansion in Portland, Maine, now occupied by Mrs. Merrill; and to my sister, Mrs. Merrill, of said Portland, I give the sum of \$250 a year during her life. I direct my — in Woodville, and my wild lands in Warren, Washington, Yazoo counties, to be sold and the proceeds re-invested.

"14. As I have acted for several years as agent for my sisters Ann and Maria Wilkins in managing their affairs, it is

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proper to state that all their funds will be found in the hands of my merchants in New Orleans, invested in commercial paper, except what stands in their own names on the books of W. A. Britton & Co., in Natchez. The account in New Orleans, for convenience, is headed 'S. S. Boyd Agency.' Some further statements on this subject (if more is desired) will be found in my letters in my iron chest at my office, accompanying a previous will, addressed to F. B. Ernest, which I refer to, not to make it a part of my will, but simply for private reference and satisfaction.

"15. For the information of my family, I state that the partnership property referred to herein consists, *in præsenti*, of the following plantations, including the slaves and all other things belonging thereto, *i. e.*, 'Magnolia,' 'Lipun,' 'Karnae,' 'Elcho,' and 'Cut Post,' with some wild lands adjoining Karnae and a lot under the hill in Natchez. The state of the accounts of each of these places will appear by the books of our merchants in New Orleans, and have always been so kept as to show the payments made by each of us, and the debits and credits entered accordingly as between us, or each of us, and said places respectively, and no account between us individually in respect to any partnership matter ever having been kept or intended. For any matters not appearing on said books, the private memorandum books and papers of each other have always been and are to be taken as true.

[SEAL]

"SAM. S. BOYD.

"Executed and published under hand and seal this twenty-sixth May, 1856."

Codicil to the will of S. S. Boyd, deceased:

"I, Samuel S. Boyd, of the city of Natchez, do make and publish this by way of a codicil or additional clause to my last will and testament, the same being wholly written in my own handwriting:

"I appoint my friend Martin Davis my executor in place of R. C. Ballard, deceased, with same power and authority in all respects, both as to my will and the will of said Ballard; and

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I make the following alteration of my said will: that is to say, as soon as a division can be had of the partnership property, etc., of the said Ballard and myself, and my debts and liabilities are paid, I direct my executor to have all my estate, except the Arlington property, divided between my wife and children in equal parts, share and share alike. The Arlington property I direct to be left for the use of my said wife and such of our children as she may choose to have with her during her natural life, and after that to be divided to and among my said children like the rest of my estate as above; and if my wife at any time declines to hold said Arlington property in the way herein directed, then it is to be divided as above among my wife and children, which can be effected by sale or as my executor may think best. In case of the death of said G. M. Davis before the final settlement of my estate, I appoint my friend Judge Alexander Montgomery my executor, with the same power and authority; and I revoke so much of my said last will and testament as may be inconsistent herewith. I request that my executor employ T. H. Thistle, as far as assistance may be necessary, in the same way I have employed him.

“Written with my hand, executed and published this tenth September, A. D. 1862.

“Witness my hand and seal.

[SEAL]

“SAM. S. BOYD.”

The will and codicil are drawn with care, and evidently the testator was a skillful draftsman, using unequivocal and plain terms to declare his intention. In the codicil he makes no change in his bequests. The will specifically devised his estate, and with such devises he is satisfied; but when and in what manner the estate devised to his wife and children shall be divided, the testator, for some reason, determines that a change should be made, and he alters the will in that regard by the codicil. He revokes the will only wherever it may be inconsistent with the codicil in that respect. In no part of this codicil does he use the words “devise and bequeath,” but studiously avoids any words which would, of themselves,

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necessarily import a devise. The widow and children take the property, not by virtue of the codicil, but under the will, through which title passes to them.

The testator is presumed to have used words in their natural sense, and when in the codicil he authorizes the executor to divide all of his estate, etc., it cannot be said that the words imported devise all his estate and authorized the executor to divide it, when by such construction a radical change would take place in the will, and bequests be revoked which were made by express terms. The intention of the testator is to be gathered from the will and codicil; both must be construed together. The words "divide" and "devise" are both used in the will — the former confined to an act to be done by the executor — and it would be a strained construction to say that in the codicil the testator intended by the use of the word "divide" to do more than authorize a change in the division of that portion of the estate already devised by the will to the widow and children.

I see no ambiguity in the language of the codicil, and its terms are not inconsistent with the special devise of the Minnesota land to the plaintiffs. Having arrived at this conclusion, it is unnecessary to consider the case any further.

Judgment for plaintiffs.

WILLS v. CHANDLER and another.

(*District of Nebraska. May, 1880.*)

1. JUDICIAL SALE — ORDER OF CONFIRMATION. — An order of confirmation of a judicial sale may cure all irregularities in the course of the proceeding, but can add nothing to the authority of the officer to make it.
2. SAME — DENIAL OF MOTION TO VACATE ORDER OF CONFIRMATION — ESTOPPEL. — A party is not estopped from bringing an action to set aside a judicial sale made without authority, by the fact that the court may have overruled the motion to set aside the order confirming such sale.
3. SAME — SAME — PRESUMPTION — COURT OF EQUITY. — Where a motion made in a state court of Nebraska, five years after a judicial sale, for a vaca-

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tion of the order confirming the same, was denied, and no ground for denial appeared in the record, *held*, that it would be presumed to have been denied because made too late for the court to grant such relief, but that it was not too late for a court of equity to grant such relief as party was entitled to.

4. JUDGMENT—ENFORCEMENT AND SATISFACTION.—In the absence of statutory regulation no one but a party, or his attorney or agent, can satisfy a judgment, or direct its enforcement by execution.
5. SAME—SHERIFF—HAS NO CONTROL OVER JUDGMENT.—A sheriff has no interest in or control over a judgment, which may include his fees, that will authorize him to enforce it. If same is settled or discharged he must look to the plaintiff or his attorney for his fees.
6. SAME—CLERK—ISSUING EXECUTION.—A clerk has no authority, in the absence of statutory regulation, to issue execution without the direction of the plaintiff or his attorney.
7. SAME—SATISFACTION OF—ATTORNEY CANNOT CANCEL.—An attorney who has given a release and satisfaction of a judgment cannot, without the consent of the other, cancel the same, and authorize an execution to issue.
8. EXECUTION SALE—SHERIFF'S POWER.—In making an execution sale a sheriff acts by virtue of a power, and if no power exists nothing passes.

Kennedy & Gilbert, for plaintiff.

G. W. Ambrose and J. M. Woolworth, for defendants.

McCRARY, *Circuit Judge*.—This is a bill in equity to quiet plaintiff's title to certain lands in the city of Omaha. It is admitted that the plaintiff's title is perfect, unless it has been divested by a sale under execution issued upon a judgment for \$251.31 and costs, in favor of Bancroft and others, and against one Nuckolls, rendered by the district court of Douglas county, Nebraska. At the time that judgment was rendered, Nuckolls, the defendant therein, was seized in fee of the premises, and the judgment was therefore a lien upon the same. Subsequently to the rendition of said judgment, W. P. Kellogg, under whom the plaintiff claims, became the owner of the land, subject to the incumbrance, and desiring to pay off the judgment and remove the incumbrance, he applied to one Meredith, who was the attorney of record for the judgment plaintiff, and paid to him the amount of the judgment,

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including interest and all costs, except about six dollars due as clerk's costs, which latter was due to defendant Chandler, who was clerk of said state court when the proceedings resulting in said judgment were had. Meredith gave Kellogg a receipt in full for the amount of the judgment, interest and costs.

There is a conflict between Kellogg and Meredith as to the question how, and by whom, the clerk's costs were to be paid; Kellogg saying that Meredith promised to pay them, and Meredith insisting that Kellogg agreed to do so. The clerk to whom the costs were due (defendant Chandler) had gone out of office and was not then in Nebraska. When he subsequently returned and learned that Meredith had receipted in full for the judgment and costs, he called upon him and demanded his costs, which, not being paid, he applied to his successor in the clerk's office and procured the issuance of an execution therefor, under which the land in question was sold and bought in by Chandler. The sale was afterwards confirmed by said district court, by which it is claimed that certain grave irregularities were cured. A deed was made by the sheriff to Chandler, who afterwards conveyed to defendant Paxton. Five years after the judgment Kellogg moved to set aside the sale. The motion was overruled, but upon what ground does not appear.

1. It is insisted that the matters complained of by the plaintiff were finally adjudicated in the state court by the order confirming the sale and the subsequent order overruling the motion to set the sale aside. This renders it necessary for us to determine what is the effect of an order of confirmation in such cases. The rule that where a court has jurisdiction of a cause, but has committed errors in its proceedings, its judgment is nevertheless final, if not appealed from, does not apply here. The order of confirmation cures all irregularities in the mode of making the sale, but can add nothing to the authority of the officer to make it. If the sale was without authority, the ratification of it by the court must be considered as

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having been given inadvertently. "If given deliberately, and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding." *Schrivers Lessee v. Lynn*, 2 How. 60.

Nor is the plaintiff or his grantor estopped by the subsequent order of the state court overruling the motion to set aside the confirmation of the sale. No greater validity was given to the sale by the latter order than by the original confirmation. Besides, that motion was made five years after the sale; and it is clear that the state court had, at that late day, no jurisdiction to entertain it. We must presume that it was overruled because it was made too late. It does not, however, follow that it is too late for a court of equity to grant relief if the plaintiff is entitled to it.

2. The validity of the sheriff's sale under which defendants claim, is attacked first upon the ground that the judgment was satisfied by the plaintiff therein, and that, therefore, the sale was void. The proof clearly shows that the attorney for the plaintiff executed to Kellogg a receipt in full for the judgment, interest and costs. This receipt may be explained by parol proof, and on explanation it is shown that the costs due Chandler, though receipted for, were not in fact paid. It remains, however, clear from the evidence that Meredith and Kellogg both intended that the receipt should satisfy the judgment and remove the incumbrance, notwithstanding the non-payment of Chandler's costs. Had they the power to accomplish this? I think it clear, under the authorities, that in the absence of statutory regulation, only the plaintiff in a judgment, or his attorney or agent, has the power either to satisfy it, or direct its enforcement by execution. In this case Chandler (the clerk) was not the plaintiff, nor was he a party to the judgment. There was, in fact, no judgment for any particular sum as costs.

Johnson v. Anderson, 4 Wend. 474, is in point. That was, like the present, a case where the judgment had been paid except certain costs, and the sheriff to whom the costs were

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due undertook to sell property on execution for the purpose of collecting them. The court said: "It is not denied that the judgment was satisfied before the sale (except as to the sheriff's fees on the execution) by a settlement between the parties. * * * The sheriff had no right to sell for the purpose of collecting his fees after due notice of the settlement and discharge of the judgment. The sheriff has no interest in the judgment which will authorize him to interfere with or control any settlement or agreement which the parties may think proper to make. His fees are no part of the judgment. They are but an incident to it, and if the judgment itself is satisfied or discharged he must look to the plaintiff and his attorney for his fees. He cannot collect them from defendant by a sale of his property." And it was held that the purchaser at the sale in that case took nothing. To the same effect see *Lewis v. Phillips*, 17 Ind. 108, and *Hampton, Ex parte*, 2 Gr. (Iowa) 137.

In the absence of statutory regulation the clerk has no authority to issue execution without the direction of the plaintiff or his attorney. Herman on Executions, 66. This must be upon the ground that the clerk is not a party to the judgment, and has no control over it.

It is said in answer to these suggestions that Chandler obtained authority from the attorney of the judgment plaintiff to issue the execution. If this be so, it does not help the defense, because that attorney had previously given Kellogg a satisfaction in full of the judgment, upon which satisfaction the latter was relying for the security of his title. To say that the attorney for the judgment plaintiff could execute a valid release to Kellogg, and then, without notice to him, cancel it, and authorize Chandler to issue execution and sell Kellogg's land, would be to sanction a gross fraud.

In selling property under an execution a sheriff acts by virtue of a power, and if the power does not exist no title passes. *Carpenter v. Stilwell*, 11 Kernan, 61; *Laval v. Rowley*, 17 Ind. 36.

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My conclusion is that at the time of the settlement between Kellogg and Meredith the latter, as agent for the plaintiff in the judgment, intended to, and did, cancel and satisfy the judgment, and remove the lien from the land in question. The judgment being satisfied, the sale was void and no title passed. There are other and probably fatal objections to the defendant's title—as, for example, the want of an appraisement and of sufficient notice of the sheriff's sale,—but these need not be considered, as what I have said is decisive of the case.

Decree for plaintiff in accordance with the prayer of the bill.

THE MISSOURI RIVER PACKET CO. v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

(*Western District of Missouri.* May, 1880.)

1. BRIDGES—MISSISSIPPI AND MISSOURI RIVERS—SECTION 2, ACT OF CONGRESS OF JULY 25, 1866—PASSAGE WAY BETWEEN PIERS—WIDTH OF.—Section 2 of the act of congress of July 25, 1866, authorizing the construction of bridges across the Mississippi river and across the Missouri river at Kansas City, construed as requiring that the passage way for vessels between the piers of any drawbridge built under said act shall be 160 feet wide in the clear, measured by a line running directly across the channel, and at right angles with the piers of the bridge. Where a bridge is built diagonally across the river, a measurement along the line of the bridge is not the proper measurement.
2. SAME—SAME—GRANT, WHEN NO PROTECTION.—The fact that a bridge has been constructed under said act of congress does not render it a legal structure, except in so far as it conforms to the terms and limitations of the act. If the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection.
3. SAME—BRIDGE CONSTRUCTED WITH TOO NARROW A PASSAGE WAY—PASSING VESSEL—LIABILITY OF OWNER.—Although the width between the piers of such a bridge may be less than the act of congress requires, yet this will not render the owner of the bridge liable for damages to a passing vessel unless the unlawful structure caused or contributed to the injury.

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4. SAME—SAME—SUNKEN PONTOON CONTRIBUTING TO VESSEL'S INJURY.—Where it was alleged that a sunken pontoon, placed and kept in the channel by the defendant, had caused a change in the current of the river which had thrown plaintiff's vessel over against a pier of defendant's bridge, and that the accident was the result of two causes combined, to wit, the presence in the channel of the pontoons and of the bridge pier, both unlawful structures, *held*, that these facts being established plaintiff could recover.
5. NAVIGABLE STREAMS—WRECK IN—CHANGE OF CURRENT—LIABILITY OF ONE CAUSING.—Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation, but he who, for his own benefit, uses any part of a navigable river, is liable in damages to any party injured, if such use causes a change in the ordinary course of the channel.
6. SAME—SAME—DUTY TO REMOVE.—If defendant had a right to keep the pontoon in the river in connection with the bridge, and it was sunk by unavoidable accident, defendant was entitled to a reasonable time in which to raise and remove it, but was not at liberty to leave it in the channel for an indefinite period.
7. COLLISION—CONTRIBUTORY NEGLIGENCE—INSTRUCTION AS TO.—An instruction to the effect that if the plaintiff has proved the facts necessary to make out his case he must recover, "unless unskillfulness or neglect on the part of plaintiff in handling his boat caused or contributed to the collision," *held*, a sufficient charge on the subject of contributory negligence.
8. NAVIGABLE STREAM—OBSTRUCTION IN—PARTY NOT ENTITLED TO NOTICE TO REMOVE.—A person who places an obstruction in the navigable channel of a river is not entitled to notice to remove the same, or to abate the nuisance caused thereby.
9. VESSEL—COLLISION WITH BRIDGE—MEASURE OF DAMAGES.—The true rule of damages in suit for injuries done to a vessel by collision, is that the plaintiff shall recover the loss necessarily incurred in repairing the injured vessel, and also for the use of the boat during the time necessary to make the repairs and fit her for business.

On motion for new trial.

Gage & Ladd, for plaintiff.

Geo. W. Easley, for defendant.

McCRABY, *Circuit Judge*.—This case was tried at the last term, and, at the request of Judge KREKEL, the motion for a new trial has been heard before a full bench.

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The plaintiff was, on the twenty-seventh of March, 1876, the owner of the steamboat Joe Kinney, and engaged in navigating the Missouri river with said vessel. The defendant is the proprietor of a railroad bridge across the Missouri river at Kansas City, which was constructed under the act of congress approved July 25, 1866. On the day above mentioned the said steamboat was damaged, in attempting to pass said bridge, in the course of one of her voyages, by being driven by the current against one of the piers thereof. Plaintiff claims to have exercised due diligence, and charges that the piers of said bridge, as well as certain pontoons connected therewith, were obstructions to the navigation of said river, and wrongfully maintained therein.

The act of congress under which the said bridge was constructed provides as follows:

"Section 2. And be it further enacted, that any bridge built under the provision of this act may, at the option of the company building the same, be built as a drawbridge, with a pivot or other form of draw, or with unbroken or continuous spans: *Provided*, that if said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation, in any case, than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge; nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river, and not less than three hundred feet in length; and *provided*, also, that if any bridge built under this act shall be constructed as a pivot drawbridge, with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length, in the clear, on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten

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feet above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river; and *provided*, also, that said draws shall be opened promptly, and upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw, during or after the passage of trains."

The act from which this section is copied authorizes the building of a number of bridges across the Mississippi river, and in its tenth section provides: "And be it further enacted, that any company authorized by the legislature of Missouri may construct a bridge across the Missouri river, at the city of Kansas, upon the same terms and conditions provided for in this act."

The third section of the same act provides as follows: "And be it further enacted, that any bridge constructed under this act, and according to its limitations, shall be a lawful structure."

The motion for a new trial is based upon alleged errors contained in the charge given by the court to the jury. These will be considered in the order in which they are presented in the brief of counsel for defendant.

1. It is said that the court erred in construing the act of congress, and particularly that portion of the act which relates to the width of the passage-way between the piers of the bridge. Upon this subject the court instructed the jury as follows:

"The law regarding the Kansas city drawbridge under consideration, is that it shall have spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw. This means that the open span between the piers must be one hundred and sixty feet when measured at right angles with the pier. If you shall find from the testimony that the Kansas City bridge was built

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diagonally across the river, and not at right angles with the piers of the bridge, the measurement along the line of the track of the railroad or the chord of the bridge is not the proper measurement, and the distance of one hundred and sixty feet thus obtained is not a compliance with the act of congress requiring one hundred and sixty feet in the clear, and to the extent of this difference between a line at right angles with the piers and the measurement along the track or chord of the Kansas City bridge, it is an unauthorized structure; so far, at least, as any question pertaining to and connected with this case is concerned. Though you may find from the testimony that the width between the piers as constructed is less than the act of congress requires, yet this violation of law by defendant in the construction of its bridge is not available to plaintiff in recovering damages unless it has caused or contributed to the injury by plaintiff complained of."

The contention of the defendant is that the distance of one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, must necessarily be measured along the track of the railroad or the chord of the bridge. The construction given to the law by the court in its charge requires that the measurement should be *across* the channel, and if the superstructure was found to be not at right angles to the current, then the measurement along the line of the bridge was not the proper one. In construing the act of congress we must look to the spirit and reason of the law. It was an act authorizing a structure to be placed in one of the navigable rivers of the United States. The purpose of the second section was to reserve, for the purposes of navigation, a certain amount of open space, or, in other words, space "in the clear," wholly unobstructed and available for the passage of vessels. To accomplish this purpose, the law requires that the pier must be parallel with the current of the river.

If it be granted that a measurement along a line which deviates from a course directly across the channel is the proper one, then it would follow that the actual passage way

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might be less than that required by the act. The greater the deviation from such a direct line, the less would be the available space between the piers. Such a construction of the act would defeat the main purpose which congress had in view in its enactment. I am, therefore, clearly of the opinion that the construction of the act contained in the above quoted extract from the charge given by the court to the jury was correct.

2. It is said that the bridge was an authorized structure, being erected at an authorized place and in an authorized manner, and that this constitutes complete immunity to defendant. The answer to this suggestion has been anticipated in what is said above. The fact that the bridge was constructed under authority granted by the act of congress of July 25, 1866, does not render it a legal structure, except in so far as it is found to be "according to its limitations." Such is the express provision of section 3 of that act. Besides, it is well settled that if the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. *Dugan v. Bridge Co.* 27 Pa. St. 303; *Judy v. Terre Haute Bridge Co.* 6 McLean, 237; *Columbus Ins. Co. v. Curtenius*, id. 209.

3. It is insisted that the court erred in treating the bridge as a nuisance *per se*, and applying the common law rule in such cases. By reference to the charge it will be seen that the court used the following language: "Though you may find from the testimony that the width between the piers as constructed is less than the act of congress requires, yet this violation of the law by the defendant, in the construction of its bridge, is not available to plaintiff in recovering damages, unless it caused or contributed to the injury by plaintiff complained of."

I am of the opinion that the court here states the true rule upon the subject. At all events the charge seems to have been, in this respect, all that the defendant had a right to

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ask. It is not necessary now to determine whether the bridge in question is so far unlawful and unauthorized as to be subject to removal as a public nuisance. It may be that in a case presenting that question it might be held that the obstruction to navigation is so slight as to be tolerated, in view of the greater aid to commerce rendered by the structure. This point is not now before us, and no opinion is expressed upon it. It is sufficient to say that if the structure is not according to the limitations of the act of congress, it is so far unauthorized, and the defendant is, therefore, liable for any injury to the plaintiff's vessel which was caused, or contributed to, by the unlawful structure; and this is all that was said by the court in charging the jury.

4. It is contended that, although the measurement sanctioned by the court should be adopted as the true construction of the act of congress, it does not follow that the plaintiff can recover, and that the charge is erroneous and misleading in so instructing the jury. The answer to this is that the court did not instruct the jury that the plaintiff must necessarily recover if the distance between the piers was less than that required by law. The instruction was, as already shown, that in order to recover the plaintiff must show that the width between the piers was less than the act of congress requires, and also that the unlawful structure "caused or contributed to the injury by plaintiff complained of."

Counsel for defendant insist that it was not claimed, on the trial, that the injury resulted from the unlawful construction of the bridge. They say that the gravamen of the charge is that the sinking of the pontoons caused a cross current to set in towards the bridge, the effect of which was to throw the plaintiff's boat over on the pier. It is quite evident, from the record, that the plaintiff charged the defendant with responsibility for two unlawful obstructions in the river, the combined effect of which was to produce the injury to the steamboat Joe Kinney, notwithstanding due diligence on the part of the officers and crew in charge of her. These were, first,

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the sunken pontoons; and, secondly, the bridge pier. It is also apparent that there was evidence tending to support the plaintiff's theory in this regard; and, based upon that evidence, the court instructed the jury, with reference to the bridge, in the language above quoted; and, regarding the pontoons, further instructed them as follows: "Regarding the pontoons, at one time kept and maintained by the defendant company, extending from the south pier up the south bank of the river, testified to, you are instructed that the company owning the bridge was not, by law, required to put them there or keep them in position, yet, if the owners of the bridge, for the protection thereof, or for any reason, kept them there, and they were, from any cause, sunk, and thereby diverted the current of the river from its usual and ordinary course or channel, thus causing difficulty or danger in the approaching of the bridge draw by boats, and that such change of the current caused or contributed to the collision of plaintiff's boat with the draw-rest of the bridge, you are authorized to find for the plaintiff, provided the plaintiff company, navigating its boats on the occasion of the collision, did so with care and skill, and did not contribute to the injury by its own neglect or improperly handling its vessel. Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation. While this is undoubtedly the law, it is also the law that he who, for his own benefit, and not for the purpose of navigation or commerce, uses any navigable part of a river, is liable in damages to the party injured if such use causes a diversion and change in the ordinary course of the channel of the river, and thereby increases the difficulty and danger of navigation, and injury results therefrom." The charge, upon this branch of the case, seems to me to have been in all respects correct.

5. It is insisted by the counsel for defendant that the sinking of the pontoons was caused by unavoidable accident, and that, under the circumstances, the defendant cannot be held responsible for the consequences. Assuming that the pon-

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toons were, while kept afloat, lawful and proper structures, and no impediment to navigation, it would probably follow that in the event of their being sunk by unavoidable accident the defendant would be entitled to a reasonable time in which to raise or remove them. But as it appears from the evidence that the pontoons in question were sunk in the winter of 1873-4, more than two years before the accident complained of, and that no attempt was made by defendant to raise or remove them, I am clearly of the opinion that the defendant was responsible for any injury resulting from their presence in the channel at the time plaintiff's vessel was injured.

6. Counsel for defendant also insist that the court erred in that part of the charge to the jury which refers to the question of contributory negligence on the part of the plaintiff. The language of the court upon this subject is as follows:

"While the defendant company were under no legal obligation to keep pontoons from the bridge pier to the banks of the river, as testified to, yet if for any reason they kept them there, and they were sunk by ice or otherwise, the company was bound to remove them; and if it failed to do so, and a change of current was caused by this neglect, and the plaintiff's boat was injured in consequence of such change, you are justified in finding for plaintiff, unless unskillfulness or neglect on the part of plaintiff in handling his boat caused or contributed to the collision."

This, certainly, left to the jury fully and fairly the question of contributory negligence. A more labored discussion of that subject could hardly have made clearer the true rule upon the subject.

7. It is insisted that it was necessary for plaintiff to prove notice to abate the alleged nuisance. There was some proof tending to show that notice was given to the agent of defendant having charge of the bridge; but whether notice to the agent, in this case, was notice to the principal, is a question upon which counsel differ. I do not think it necessary to consider that question, for the reason that, in my opinion, no notice

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was required. The rule requiring notice to abate, before an action for damages can be maintained, does not apply to the case of an obstruction to a navigable river or other public highway. It applies only to cases where the complaint is against the grantee of land on which a previous owner has erected a nuisance. He who erects a nuisance, even on his own land, is not entitled to notice. *Ray v. Sellers*, 1 Duv. 254; *Slight v. Gutzlaff*, 35 Wis. 675; *Cochocton v. R. Co.* 51 N. Y. 573.

But the person who allows the continuance in its original state of a nuisance on his own land, erected there by his grantor, is entitled to notice. *Woodman v. Tufts*, 9 N. H. 91; *Snow v. Cowles*, 22 N. H. 296; *Johnson v. Lewis*, 13 Conn. 303.

For full discussion of the whole subject, and citation of authorities, see *Plumb v. Harper*, 14 American Decisions, 333, 338.

It is entirely clear that the doctrine of notice has no application to the present case.

8. It is insisted that the charge of the court as to the measure of damages was erroneous. The charge upon this point is as follows:

"Regarding the rule of damages, in case you find for plaintiff, you are instructed to allow the amount shown to have been paid by plaintiff for repairs, together with six per cent. interest from the day of the beginning of the suit, which was on the sixteenth day of August, 1876; and for such a reasonable amount of charter rent, during the time the boat was repairing, as you may deem right under the testimony."

To this charge, in itself considered, no exception can be taken. But counsel insist that all the witnesses testified that they arrived at the charter value from the earnings of like boats in the same trade, it not being shown that any boats on the Missouri river were being chartered, or that there was any charter value established on that river.

The true rule of damages in such cases is that the plaintiff

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shall recover the loss necessarily incurred in repairing the injured vessel, and also for the use of the boat during the time necessary to make the repairs and fit her for business. *Williamson v. Barrett*, 13 How. 110; *The Baltimore*, 8 Wall. 387; *The Cayuga*, 14 Wall. 278.

The evidence objected to seems to have been clearly admissible for the purpose of fixing the amount of plaintiff's damages, within this rule. If no boats were being chartered on the Missouri river, and therefore no established charter value could be shown, it was certainly proper to show the value of the use of the vessel from the earnings of like boats in that river.

The motion for new trial must be overruled.

KREKEL, *District Judge*, concurs.

SAHLGARD v. KENNEDY and others.

(*District of Minnesota. May, 1880.*)

1. EQUITY — BILL TO SET ASIDE DECREE — JURISDICTION.— If, in a direct proceeding to set aside the decree of another court, there are parties before the court other than those in the proceeding in which the decree was rendered, and it is charged that such decree was fraudulent, the court may entertain jurisdiction thereof, and prevent the parties before it from proceeding to enforce such decree or availing themselves of any advantages thereunder.
2. SAME — SAME — FRAUD.— An original bill is a proper mode of seeking redress against a decree obtained by fraud or covin.
3. SAME — SAME — WHEN PROCEEDINGS SHOULD BE IN COURT RENDERING DECREE.— Where the proceedings to obtain relief against a decree are tantamount to common-law practice of moving to set aside a judgment for irregularity, writ of error, or bill for review, they should be in the court where the decree is rendered; but if they are equivalent to a bill in equity to set aside for fraud, they constitute a new and original proceeding.
4. SAME — SAME — SUFFICIENCY OF BILL.— A bill in equity by a bondholder to set aside a foreclosure decree and sale thereunder containing allega-

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tions tending to show that one of the trustees under the mortgage combined with the purchasers at the sale to bid in the mortgaged property at a sacrifice of the interests of the bondholders, and that the trustee permitted the control of the foreclosure proceedings to pass into the hands of such purchasers, states equities sufficient to require an answer.

Demurrer to bill.

Gilman & Clough, for plaintiff.

Geo. B. Young, Geo. L. & Chas. E. Otis, and R. B. Galusha, for defendants.

NELSON, *District Judge*.—The complainant, an alien, files his bill in equity on behalf of himself and other holders of any of the \$3,000,000 issue of bonds by the First Division of the Saint Paul & Pacific Railroad Company, of the date of March 1, 1864, who shall come in and contribute to the expenses of this suit. Relief is prayed against a decree charged to have been obtained in a state court of Minnesota by the fraudulent practices of some of the defendants, and a sale thereunder in fraud of the rights of complainant and others similarly situated.

The bill alleges that a suit was brought in the court of common pleas of Ramsey county, Minnesota, to foreclose a trust deed executed by the First Division of the Saint Paul & Pacific Railroad Company to secure \$3,000,000 of bonds, and on March 24, 1879, a decree of foreclosure was entered by consent of parties to the record in said suit, no answer having been interposed to the complaint.

The relief prayed for is substantially that the said mortgage be declared by the court to be a subsisting and valid lien upon the property described therein, and the rights of the holders of all of said bonds outstanding be maintained, and they be allowed to prove them; that the sale of said property under the said decree of the said state court, and the deed executed to the purchaser thereupon, be declared to be fraudulent and void, and be set aside and cancelled; that a receiver

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be appointed to take possession of the property, the purchasers at said sale enjoined from interfering therewith, and account for the earnings and income while in their possession, and that the property be sold under direction of this court for the benefit of all the *bona fide* bond holders. General relief is also asked. A demurrer is interposed by the defendants, alleging:

1. Want of jurisdiction in this court. The defendants' counsel argue, with great ability, that relief should be sought in the court rendering the decree; that this court has no jurisdiction to interfere with, set aside or annul the decree of the court of common pleas, that court pertaining to another sovereignty. As I understand the rule, it is this: that in all cases where, in a direct proceeding, there are parties before a court other than that in which a decree has been rendered, and it is charged that the decree was fraudulent, the court can entertain jurisdiction, and if the fraud is proved, can prevent all parties who are before it from enforcing the decree, and, of course, from obtaining any advantage by virtue of a sale made thereunder. The court acts upon the decree and sale through the parties who are before it, not directly upon the decree of the other court, but adjudges that, notwithstanding the decree, the parties who obtained it, and those before the court who claim property by virtue of a sale under it, with knowledge of the fraud, shall not appropriate to their use the property thus acquired.

It is true, relief may sometimes be had by motion in the same court, or by a bill in the nature of a bill in review, but such relief is not always adequate, and an original bill is a proper mode of seeking redress against a decree obtained by fraud or covin.

The rule is clearly and concisely stated by Justice BRADLEY in *Barrow v. Hunton*, 9 Otto, 82. In speaking of the distinction between the two classes when an original suit may be entertained, and when the application for relief should be made to the court granting the judgment or decree, he says:

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"If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not entertain jurisdiction of the case. * * * On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, * * * and the case might be within the cognizance of the federal courts. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; in the other, the investigation of a new case, arising upon new facts, though having relation to the validity of an existing judgment or decree, or to the right of the party to claim any benefit by reason thereof."

I think the jurisdiction of the court to entertain this suit not doubtful, and the bill must stand, unless there is no equity stated therein, and this brings me to the consideration of the other ground of demurrer.

2. The defendants demur for want of equity in the bill. The bill alleges, in substance, that the trustees, in the deed to secure the \$3,000,000 issue of bonds, in May, 1874, at the instance of John S. Kennedy, one of the defendants in this suit, and the agent of a committee of Amsterdam bondholders, having in their hands and under their control a majority of the bonds of this series, commenced a suit against the First Division of the St. Paul & Pacific Railroad Company and others to foreclose the trust deed, and that after the commencement of the suit Kennedy, the agent, entered into an agreement with the defendant company for the suspension of the prosecution of the suit, and the trustees who instituted it, at his instance, suspended the prosecution of the same for several years, and until requested by him to proceed; that some time in 1878 one of the trustees resigned, and Kennedy was appointed as trustee and co-complainant in said foreclosure

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suit, and thereafter acted in the capacity of trustee in said trust deed and foreclosure suit, and as the special agent of the committee, and of the bondholders who had placed their bonds in the hands of the committee for control and management; that on the ninth of October, 1876, the trustees, including Kennedy, under the authority conferred in the deed of trust, took possession of the railroad appurtenances and property covered by the trust deed, and operated the road, and that in 1876 or 1877 Donald A. Smith, George Stephen, N. W. Kittson, James J. Hill and others formed a syndicate for the purpose of acquiring the line of railroad, etc., covered by the mortgage, under the foreclosure proceedings and a sale, and made a proposition, through Kennedy, to the committee of Amsterdam bondholders for the purchase and control of the bonds in their hands, and that Kennedy, the agent of a committee of bondholders, and trustee for all the bondholders, entered into an agreement with Smith, Stephen, Kittson and Hill for the purchase and control of the bonds held by the committee, and into negotiations which contemplated the acquisition of the line of railroad of the first division of the St. Paul & Pacific Railroad Company, etc., by purchase at the foreclosure sale to be made in said pending foreclosure suit, and payment therefor in bonds; that the suit should proceed under the advice and instruction of said parties, Smith and others; that the negotiation for the sale of the bonds was consummated with Kennedy, who approved the proposal and recommended its acceptance, and that the suit was prosecuted, conducted and concluded under the advice and instruction of Smith, Stephen, Kittson and Hill, through Kennedy as agent, and with a view to obtain a transfer of said road to them under the forms of judicial proceedings in fraud of the rights of bondholders who had not contracted to sell their bonds to said parties; that Kennedy, as agent, paid and controlled the counsel in the foreclosure suit; and further, in substance, that the result of the suit and the decree, by consent, was in the interest of the parties who had so negotiated with Ken-

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nedy, they having become *domini litis* in respect to the foreclosure proceedings. It is also charged that the trustees, through Kennedy, fraudulently connived and combined with the syndicate to allow the property and railroad to be purchased at the foreclosure by the St. Paul, Minneapolis & Manitoba Railroad Company at a nominal price, compared with its true value.

“PROPOSAL MADE AT NEW YORK MEETING OF JANUARY 3, 1878, BY CANADA PARTY.

“[TRANSLATION.]

“The proposal embraces all certificates which have been issued by the committee, and must be accepted by at least the same proportion of certificates which acceded to the former proposal. It is offered to pay for first section bonds (\$1,200,000) net 75 per cent. in gold; consolidated bonds (\$2,800,000) net 28 per cent. in gold; second section bonds (\$3,000,000) net 30 per cent. in gold; 1869 bonds (\$6,000,000) net 35 per cent. in gold; St. Vincent & Brainerd bonds (\$15,000,000) net 13½ per cent. in gold, of the nominal amount of the bonds, including the past-due coupons, which pass with the bonds for this price.

“Upon acceptance of this proposal, these bonds shall be deposited in the Mercantile Safe Deposit Company of New York, in the name of trustees, for which the committee proposes the Messrs. J. S. Kennedy and John S. Barnes, chiefs of the firm of J. S. Kennedy & Co. These bonds shall be delivered to the purchasers by the trustees, as agents of the committee, against the payment of the purchase price in the manner hereinafter named.

“The aforesaid purchase price must be paid within six months after the date, which, by virtue of the last foreclosure decree of each court, has been declared as the day of the sale of the bonds, as described in the trust deeds by which the above named issues of bonds have been respectively secured. The

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aforenamed purchase price for said bonds shall bear interest from the twenty-second of December, 1877, at seven per cent. per annum, payable half yearly in gold, in the city of New York. The principal of the above named purchase price shall be paid — *First*, either in gold; *second*, or in first mortgage gold bonds of the newly to be created company, bearing seven per cent. interest, payable half yearly in gold at par; but the purchasers shall also add to every bond of \$1,000 the amount of \$250, in first preferred stock of the new company; *third*, or, at the option of the certificate holders, or any of them separately, the same first mortgage gold bonds as described under number two calculated at ninety per cent., but in that case without addition of the preferred stock.

“It is further expressly agreed that on the reorganized road no further first mortgage shall be issued than the above named, so that the rate of \$12,000 per mile on the completed road shall not be increased.

“As soon as ‘*bonds*’ shall be offered in payment the form and contents of the trust deeds must be subjected to the approval of the agents of the committee. The trust deeds must comprise all property of any and every kind belonging to the new company at the time that the mortgage is created, including the land grant, and these bonds shall be received at par in payment for the lands of the company.

“The total amount of the above named *preferred stock* shall be limited to twenty-five per cent. of the whole issue of bonds of the first mortgage, and the dividend on this preferred stock not to exceed six per cent. per annum in currency shall be paid, but only after the receipts of the new company, after payment of all necessary expenses and the interest on the bonds, shall have been provided for.

“The option of payment named under number one and number two is left, primarily, to the purchasers, but should they choose to pay in money the seller shall have the right to demand bonds, as described — subdivisions two and three —

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either at par with preferred stock or at ninety per cent. without preferred stock.

"The purchasers further bind themselves:

"*a.* As soon as they have received the notice that their offer is accepted, and the bonds have been delivered to the above named trust company, to restitute the costs caused by them to the committee, as well as the amount of the committee costs resting on the assenting certificates.

"*b.* To complete the extension to St. Vincent as speedily as possible; if possible within this year, and agree to furnish sufficient security for the execution hereof, which will be acceptable to the agents of the committee, Messrs. J. S. Kennedy & Co.

"*c.* To restitute the cost of the construction of the Breckenridge-Barnes line *in cash*, at the same time with the payment for the bonds, and in the meanwhile to pay interest at seven per cent. per annum, half yearly.

"*d.* The now pending foreclosure suits, and other suits, shall be continued by the committee and its agents, under advice and instruction of the purchasers, free of all costs for the holders of the assenting certificates.

It is unnecessary to recapitulate all the allegations in the bill which are conceded to be true by the demurrer, nor is it necessary to determine whether all the relief prayed for can be granted. The charges are sufficient to require an answer, for they tend to show that Kennedy combined with Smith, Stephen, Kittson and Hill to aid them in acquiring the property mortgaged at a sacrifice of the interests of bondholders not parties to the contract, to secure the road, etc., and that the former permitted the control of the litigation to pass to Smith and his associates, consenting that they might assume the functions of trustees; the co-trustees of Kennedy in the trust deed having accorded to him the right to determine and control the action of the trustees in all matters appertaining to the trust property and the execution of the trust.

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While there is no doubt that creditors may combine to purchase the property of their debtor, and such action is proper and will be sustained, yet if a trustee, holding the property for the benefit of all the creditors, combine with a part to aid them in purchasing it to the exclusion of the other creditors, and the trustee also has in his possession, as agent, the evidences of debt belonging to the creditors with whom he has combined, and the property, by the act of the trustee, passes into the possession of those creditors at a price much less than its value, it can hardly be claimed that a purchase thus consummated is not inequitable. Such is one of the charges in the bill, and it requires an answer so that the court may determine upon the proofs, at the final hearing, whether it is true or not.

The demurrer is overruled, with leave to answer at the July rule day.

KROPHOLLER v. THE ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY Co. and others.

(*District of Minnesota.* May, 1880.)

1. **MORTGAGE—CREDITORS MAY COMBINE TO PURCHASE PROPERTY.**—The creditors of a mortgagor may fairly combine to purchase the property of the debtor at mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale.
2. **BILL TO VACATE DECREE AND SALE—WANT OF EQUITY.**—Bill in equity in this case not showing the complainant clearly entitled to all the relief claimed, and as he may, on proper petition and showing, be admitted as a party to the original suit, the bill in which he seeks to attack the decree and sale is dismissed.

Demurrer to bill.

Gilman & Clough, for plaintiff.

Geo. B. Young, Geo. L. & Chas. E. Otis and R. B. Galusha, for defendants.

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NELSON, *District Judge*.—The only question raised, by the demurrer, to be considered in this case, is whether the bill is wanting in equity. The complainant makes no substantial charge of fraud against any trustee in the deed to secure the \$15,000,000 issue of bonds, and his bill alleges no grievance which determined the court to overrule the demurrers in the cases of *Stricker v. Kennedy et al.*, *Messchaert v. Kennedy et al.*, and *Sahlgard v. Kennedy et al.* Kennedy was never a trustee in this trust deed, and his acts as the agent of the committee of bondholders of the \$15,000,000 issue are not subject to the criticism made in the other cases.

The fact that Kennedy, who is not a trustee in this deed, as agent of the foreign committee, entered into an agreement for the sale of the bonds held by the committee with Smith, Stephen, Kittson and Hill, and consummated it, and such agreement contemplated the purchase of the railroad and appurtenances, would not call for the interference of a court of equity. These creditors could fairly combine to purchase the property of their debtor, and other bondholders and creditors are not, by such combination, deprived of the right to bid at a sale under the decree.

The charges made against the order of the court authorizing the receiver to issue debentures and complete the unbuilt portion of the road, and the manner in which it was built, and the amount of debentures issued and paid over for such construction, afford no ground of equitable relief. The court, before the decree was made, examined the objections in respect thereto, and only issued an amount of debentures equal to the cost of construction as clearly established by proof.

The charges against the decree are not such as in my opinion would authorize a court to disturb it, and the sale was made under the decree, for anything that appears in the bill, fairly and for more than the price fixed by the court. That the purchaser was authorized to pay all of the bid except \$50,000 in the debentures issued by the court, and in the bonds of the \$15,000,000 issue at the percentage upon

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their fair value equal to the dividend to which they would be entitled upon a distribution of the proceeds of the sale, is not inequitable. Substantially, such a provision in a decree met with the approval of the United States supreme court in *Ketchum v. Duncan*, 6 Otto, 659.

. The bill, also, in attacking the sale, charges the trustees with neglect in respect thereto, amounting to fraud. I am not prepared to admit that the allegations of the bill in that behalf entitle the complainant to any relief.

In the order confirming the sale the following provision was inserted: "This order is made by and upon the consent and at the request of the trustees, the complainants, and upon the consent of the parties defendants, * * * and the right to make any further order is reserved." In view thereof, I think the complainant, if entitled to any relief against the sale and the confirmation thereof, should permit a petition, asking to be admitted a party to the original foreclosure suit, and if the court admits him, the objections would then be considered. He can have such opportunity at the next June term of the court.

The demurrer is sustained and the bill dismissed.

SULLIVAN v. THE UNION PACIFIC RAILROAD COMPANY.

(District of Nebraska. April, 1880.)

DAMAGES — NEGLIGENCE.— In the absence of a statute damages cannot be recovered by a father from a railroad company for causing the death of a minor son.

The petition states the following facts, viz.: The plaintiff, a citizen of Omaha, was the father of James Sullivan, who, on the twelfth day of July, 1872, was killed by the negligence of defendant, the Union Pacific Railroad Company; that at the time of said killing said James Sullivan was hired by plaintiff

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to defendant at two dollars per day. Plaintiff sues to recover wages at that rate during the minority of the deceased, about four years.

A. J. Poppleton, for defendant, on hearing on demurrer, claimed that there could be no recovery, there being no statute providing for such a case.

J. I. Redick, for plaintiff, argued that, the action being grounded in contract, no statute was necessary.

MCCRARY, *Circuit Judge (orally)*.—This is an action for damages by a father, who seeks to recover from the railroad company by reason of negligence in causing the death of a minor son. There is a demurrer to the petition.

The supreme court have decided in a recent case that there can be no such recovery in the absence of a statute.

See *Insurance Co. v. Brame*, 95 U. S. 754; *Thomas v. Union Pacific Railroad Company*, Supreme Court U. S. Oct. 7, 1879.

The demurrer is sustained.

NORTHERN PACIFIC RAILROAD CO. v. ST. PAUL, MINNEAPOLIS
& MANITOBA RAILWAY CO. and others.

(*District of Minnesota.* ———, 1880.)

1. EMINENT DOMAIN—NORTHERN PACIFIC RAILROAD COMPANY—STATE STATUTE.—The charter of the Northern Pacific Railroad Company, obtained from the general government, does not exempt its right of way from the operation of the laws of the state of Minnesota, and forbid a railroad company organized under the general law of the state to exercise the right of eminent domain.
2. SAME—REVISED STATUTES OF STATE OF MINNESOTA, ch. 34, §§ 13–23.—In Minnesota, a railway corporation can only take possession of lands under the power of eminent domain after the compensation for the property to be taken is assessed and paid, or on appeal from the award of commissioners by executing a bond conditioned to pay the award. *Harrington v. St.*

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P. & S. C. R. Co. 17 Minn. 215, and *Lohman v. St. P., S. & T. F. R. Co.* 18 Minn. 174, distinguished.

Hearing on order to show cause why a temporary injunction should not issue.

Gilman & Clough, for plaintiff.

Bigelow, Flandrau & Clark and *R. B. Galusha*, for defendants.

NELSON, *District Judge*.—Application for an injunction to restrain defendants from building the proposed railroad from Barnesville to Moorhead across the track of the plaintiff, and the strip of land upon which the same is constructed, and extending two hundred feet on either side thereof, is heard upon bill, special answer, and affidavit of the president of the defendant, the Barnesville & Moorhead Railroad Company. It appears that the latter company has taken steps, according to the laws of the state of Minnesota, to obtain a right of way or crossing over the plaintiff's railway track. The proceedings are not completed, and no appraisers or commissioners have been appointed to fix the amount of compensation or damage. Said defendant also claims title to the property over which the plaintiff's road runs at the point it desires to cross with its road, and seeks to take possession of the same, with the view of making its crossing, without the plaintiff's permission or consent. The plaintiff, being in the possession and occupation of the premises, cannot be disturbed in such possession except through proper legal proceedings; and if the defendant has a better legal title to the same, an action of ejectment will lie to enforce its right. I cannot, on this application, try the question of title, but must hold that the open and acknowledged possession of the plaintiff is sufficient to sustain an injunction to prevent interference therewith, forcibly or without its consent. The plaintiff, if it desires, may amend its bill, setting forth its title to the particular tract of land over which

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its road passes at the point where said defendant seeks to cross.

I have no doubt of the right of the Barnesville Railroad Company to cross the plaintiff's road, on payment of compensation therefor, when the amount is fixed by commissioners selected under the railway legislation of this state; and the charter of the Northern Pacific Railroad Company, obtained from the general government, does not exempt its right of way from the operation of the laws of the state of Minnesota, and forbid a railroad company organized under the general laws of the state to exercise the right of eminent domain. The important question in this case is, whether this defendant can enter upon the private property of this company and disturb its possession and make the crossing before damages are actually assessed and paid, or secured. The laws of the state certainly do not authorize it, and the constitution in terms forbids it. "Private property shall not be taken for public use without just compensation therefor, first paid or secured," is the constitutional provision. Chapter 80, laws of 1879, and chapter 34, sections 13 to 23, Young's Minnesota statutes, confer the right of eminent domain upon all railway corporations, and specify the necessary proceedings where a corporation exercises it, and it is only after the compensation for the property to be taken is assessed and paid, or an appeal taken from the award of commissioners, that the company can proceed with the construction of its railroad, and enter upon and take possession of the premises sought to be condemned, and on appeal only by executing a bond conditioned to pay the award.

The defendant, the Barnesville & Moorhead Railroad Company, by virtue of its organization under the general laws of the state, has the right to temporarily occupy land for the purpose of preliminary surveys, exercising care so as not to interfere with the running of trains or such necessary use by the plaintiff company as its charter requires, and is not a trespasser in so doing; but the payment or deposit in court of

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the compensation awarded by the commissioners is a condition precedent to the right of the company to enter upon property for the purpose of construction. The plaintiff has not slept upon its rights and allowed the said defendant to occupy its land, but asserts them at the outset.

In the case cited by the defendants' counsel (17 Minn. 215, and 18 Minn. 174), the railroad companies had taken possession of the land without opposition and constructed their roads, and the court refused an injunction, or permitted a bond to be given by the corporations with the condition that compensation should be paid when ascertained in proceedings to be forthwith instituted. These decisions are not applicable to the present case. There is no inconvenience to the public for the reason that the railroad is not completed and in operation, as in the cases cited.

I have fully considered the suggestion of counsel that a conditional order be made allowing an injunction, unless, within a short time to be fixed by the court, the defendants execute a bond conditioned to prosecute, forthwith, the proceedings commenced to obtain the right of way for crossing plaintiff's track, and to pay such sum as the commissioners may award. I do not think this court has any power to grant the right of entry upon the plaintiff's road for this purpose on any such condition. The right of the Barnesville & Moorhead Railroad Company to cross the plaintiff's track is given by the statute of the state, which particularly and in detail points out the requisite steps to be pursued as conditions precedent to the right to construct the crossing, and without compliance therewith it must be enjoined. There is not such latitude for the exercise of discretion by a court of equity where the defendant's right to do an act depends upon its compliance with the constitution of the state and the statutes, as in other applications for injunctions.

A temporary injunction will issue, with leave to the defendants to apply for a dissolution thereof hereafter, to either of the judges of this court.

Shearer v. Corbin.

SHEARER v. CORBIN.

CORBIN v. SHEARER.

(*District of Minnesota. September, 1880.*)

TITLE — PRIMA FACIE EVIDENCE — TAX DEED — RECITAL.—In Minnesota a tax deed is not *prima facie* evidence of title, unless it be first shown that the county auditor had authority to make the deed; and a mere recital in such deed that the state auditor directed the sale, will not be sufficient. *Madland v. Benland*, 24 Minn. 372.

Edward Webb, for plaintiff.

Charles N. Bell, for defendant.

NELSON, *District Judge*.—The suit first entitled is an action in ejectment, and to the complaint the defendant interposes a general denial, and also sets up specially, as a further defense, the proceedings which resulted in a sale of the land in controversy to the defendant's grantor for non-payment of taxes, and a tax deed, dated October 6, 1869, from the county auditor, of the property claimed as forfeited by law to the state of Minnesota. And as a further defense, he alleges that his grantor, one Jaggers, went into possession under the tax deed, and remained in possession of the property until 1872, improving the same and paying the taxes thereon. The reply puts in issue the material allegations.

In the suit second above entitled the complainant, by a bill in equity, seeks, among other things, to recover for improvements and expenses necessarily incurred in his occupancy of the land. Both suits, by stipulation, are tried to the court, a jury trial being waived in the ejectment suit. The bill contains sufficient equity to sustain a recovery for taxes paid and improvements, and the parties have stipulated as to the amount. The success of the plaintiff in that suit must be determined by the action at law. The plaintiff in the first

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action must recover, if at all, on the strength of his legal title.

The case turns upon the effect of the tax deed to the defendant's grantor. The plaintiff proved his title by patent and successive deeds under it, down to himself, and he is entitled to recover the possession of the property, unless the tax deed, without further preliminary proof, is *prima facie* evidence of title in Jaggers. Gen. St. ch. 11, § 124, in substance provides that when lands, delinquent for non-payment of taxes, are offered for sale at public auction, "and not purchased by any person, * * * shall be struck off to and become forfeited to the state;" and section 137, that at the expiration of two years from the date of forfeiture, lands so forfeited and not redeemed become "the absolute property of the state, without further act or ceremony whatever," and were subject to "be disposed of for cash, at public or private sale, as the state auditor might direct;" and section 138, under which the county auditor executed the deed to the defendant's grantor, and which he claims vests the title in him, provides that, "upon the sale of any such land or lots by the state, the county auditor of the county in which the lands lie shall execute a deed of conveyance thereof to the purchaser, which shall vest in the grantee, his heirs or assigns, a good and valid title in law and equity, and be *prima facie* evidence thereof in all the courts of this state."

The jurisdiction of the county auditor, or his power to execute "a deed" which should vest "a good and legal title," and be *prima facie* evidence of the same, depends upon a sale directed by the state auditor. I think the settled authority in this state, under the statute urged by the defendant, and similar legislative enactments, where the facts specially relied on are pleaded, is that the person relying upon the tax deed as *prima facie* evidence of title must first prove the county auditor had authority to make the deed; and the recital in the deed, that the state auditor directed the sale, is not sufficient.

The opinion of the supreme court (24 Minn. 376), as I

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understand it, determines that the statute makes the tax deed *prima facie* evidence of title upon a sale by the state which is shown by proof (not recitals in the deed itself) to have been directed by the state auditor; and that the deed, which is evidence of a good and valid title, is declared to be evidence only of such title after the right to give the deed has been proved. The state claimed the land as forfeited, and it was so entered. The county auditor, until the state auditor directed the land to be sold, had no power to sell to Jaggars; and, until the defendant proved the power to sell emanated from the state auditor, the deed executed to Jaggars could not be received as *prima facie* evidence of title. 24 Minn. 372. If I am right in this conclusion, the plaintiff is entitled to recover.

STATE INS. CO. OF MISSOURI v. REDMOND, Assignee, etc.

(Eastern District of Arkansas. —, 1880.)

CORPORATION — SUBSCRIPTION — PAYMENT. — A corporation whose charter and by-laws require each subscriber to its capital stock to pay a given percentage of his subscription in cash at the time of subscribing, cannot enforce payment of a subscription where the required cash payment has not been made.

CALDWELL, *District Judge*. — The plaintiff filed with the register proof of a claim against the estate of the bankrupt, which was allowed. Afterwards, on re-examination of the claim, under rule 34 of General Orders in Bankruptcy, the same was disallowed and expunged by the register. This order of the register is before the court for review, on special petition for that purpose.

The bankrupt subscribed for ten shares, of \$100 each, to the capital stock of the plaintiff. The charter of the company, at the date of this subscription, contained this provision: "For the better security of policy holders the said company

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may add a stock capital, not less than \$100,000, nor more than \$600,000, which may be increased by a majority vote of the stockholders to any amount not exceeding \$1,000,000. Said stock shall be divided into shares of \$100 each, and at least \$20 shall be paid in cash on each share, and the remaining eighty per cent. shall be secured by mortgage on real estate worth at least double the amount secured, or by a note with two responsible sureties, or by deposit of United States or other approved bonds or stocks."

Article 23 of the by-laws of the company provided that "stockholders of the State Insurance Company of Missouri will be required to pay twenty per cent. in cash on the amount subscribed, as follows, viz.: Ten per cent. in cash at time subscription is made, five per cent. in thirty days thereafter, and five per cent. in sixty days thereafter," and the remaining eighty per cent. to be secured in the manner provided in the charter.

The subscription contract signed by the bankrupt contained a provision on the subject of the payment of the subscription identical with the by-laws above quoted.

The bankrupt paid no part of his subscription in cash at the date of subscribing, and has never paid anything thereon. Of even date with his subscription he executed two notes to the company: one for \$200, being twenty per cent. of the amount of his subscription; and one for \$800, with one surety, for the remaining eighty per cent. The latter note recites that it is given in consideration of a "certificate of stock, No. 542, for ten shares of the capital stock" of the company.

The proof of debt is based on the note for \$800, and alleged calls made thereon amounting to \$700. The bankrupt never received the certificate of stock mentioned as the consideration for the \$800 note; the company withholding it on account of the non-payment by the bankrupt of the \$200 note given for twenty per cent. of his subscription.

A fair interpretation of the charter requires twenty per cent. of each subscription to be paid in cash at the time it is

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made. The by-laws and subscription contract in terms require ten per cent. of all subscriptions to be paid in cash at the time of subscribing.

A corporation is the mere creature of law, and its power to do business and make contracts is limited by its charter. Powers not conferred by its charter, or by necessary implication, cannot be exercised. It can bind itself, and others can become bound to it, only in the mode prescribed by the law of its creation, and such by-laws as it may lawfully enact. *Pearce v. M. & I. R. Co.* 21 How. 441. And, where the charter and by-laws of a corporation require subscribers to its capital stock to pay a given percentage of their subscriptions in cash at the time of subscribing, the subscription, without such payment, creates no binding obligation. "Each subscriber must pay as a condition precedent to his own liability attaching." *Crocker v. Crane*, 21 Wend. 211.

"The subscription and the payment of the ten per cent. must both concur to make a valid subscription. The writing of the name in the subscription book should be deemed but part of the transaction, and provisional or conditional until the ten per cent. is paid." *B. R. & U. R. Co. v. Clark*, 25 N. Y. 208; *Beach v. Smith*, 30 N. Y. 116.

The subscription was not binding on the company. Its agent transcended his authority and exceeded the powers of his principal in taking the subscription on the terms that he did, and the subscriber acquired no rights under it that he could enforce against the will of the company. It did not bind the company, and imposed no obligation on the bankrupt.

"Every contract, where the consideration is promise for promise, must be obligatory on both parties, or both will be at liberty to recede. The company could introduce no one as a member in any other way than that pointed out in the act of incorporation; and even if it could, it would be required that the defendant's title should have been good when he subscribed, otherwise the contract would be without mutual-

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ity; and if he acquired no right, which he could enforce against the will of the plaintiff, he incurred no responsibility." Per Chief Justice GIBSON, *Hibernia Turnpike Co. v. Henderson*, 8 S. & R. 217; and to the same effect are *Jenkins v. Union Turnpike Co.* 1 Caines' Cases, 86; *Highland Turnpike Co. v. McKean*, 11 Johns. 93.

The plaintiff cannot treat the \$200 note given for twenty per cent. of the subscription as cash, because it has not been paid; nor can it waive the payment of the twenty per cent., because it has no authority under its charter to receive subscriptions for less than the par value of the stock. When the capital stock of a corporation was divided into shares of \$50, and there was nothing in the charter which prohibited the directors from disposing of the stock for less than \$50 a share, it was held that an arrangement by which the directors of the corporation disposed of shares for a less sum was in violation of the charter, and that a promissory note given for stock so disposed of was void. Justice McLEAN, delivering the opinion of the court, says: "It is said there is nothing in the charter which prohibits the directors from taking subscriptions of stock for less than \$50 a share. No such provision was necessary. The duties of the directors are plainly pointed out in the charter, and as these powers were wholly derived from that instrument, it was not necessary to prohibit them from doing that which their charter did not authorize them to do. The charter fixed the rates at which the shares should be subscribed. This is matter of law. * * * The subscription of stock by plaintiff for less than the price of the shares fixed in the charter was void, as against law and the powers of the directors." *Sturges v. Stetson*, 1 Biss. 246; and see *Fosdick v. Sturges*, id. 255.

The bankrupt received no certificate of stock, never paid any part of his subscription, and has done nothing to estop him or his assignee from setting up this defense. The subscription was not taken in conformity to the requirements of the plaintiff's charter and by-laws, and imposed no obligation

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on the company or the bankrupt that can be enforced against the will of either.

STEWART v. TERRE HAUTE & I. R. Co.

(*Eastern District of Missouri.* October, 1880.)

1. COMMON CARRIER—LIABILITY BEYOND ROUTE.—In the absence of a special contract the liability of a common carrier does not extend beyond the terminus of his own route.
2. SAME—SAME—EVIDENCE.—Such contract is not established, however, by proof that the carrier accepted the goods with knowledge of their destination, and named the through rate for the same.

Motion for judgment.

G. S. Van Wagoner, for plaintiff.

E. W. Pattison, for defendant.

McCARY, *Circuit Judge*.—In July, 1877, the plaintiff shipped upon defendant's railroad two hundred and forty-eight head of cattle, at East St. Louis, consigned to Rankin & Thompson, at Buffalo, New York. The defendant's line of railroad extends only as far east as Indianapolis, Indiana, and the cattle would, in order to reach Buffalo, pass over the defendant's line and that of several connecting lines. It is admitted that the cattle were transported with safety, and without unnecessary delay, over the defendant's road, and delivered to a connecting railroad to be taken on towards their destination; but is claimed by plaintiff that after the cargo passed beyond the defendant's road there was delay in the transportation, by which he is damaged, and for which the defendant is liable; this, upon the ground that the defendant agreed to transport the cattle over the entire route to Buffalo. The plaintiff having closed his evidence in chief, the defendant moves for judgment, on the ground that the plaintiff's proof does not estab-

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lish a contract to carry through to Buffalo, but only a contract to carry over its own line and deliver to the next carrier.

The facts proved by plaintiff, so far as they bear upon the question of the character of the contract, are as follows: Plaintiff informed the agent of the defendant at East St. Louis that he desired to ship a lot of cattle to Buffalo, and inquired of said agent whether the defendant was shipping and would take the cattle for shipment. The agent replied that they were shipping at that time, and could take the cattle; and, in answer to an inquiry by the plaintiff, informed him that the through rate to Buffalo was \$70 per car. The plaintiff thereupon agreed to ship over defendant's road, and did so. The freight was paid, at the end of the route, to the last shipper, as was customary in such cases, and each of the lines over which the shipment passed received its proportion, the defendant receiving payment only for the carriage to Indianapolis. There was no written contract, but a memorandum was made by the defendant's agent showing the number of the cars on which the cattle were shipped, the name of the shipper, the number of cattle, the names of the consignees, and the destination.

Plaintiff had been in the habit of shipping over defendant's line to points beyond its terminus; and the arrangements made in this case were similar to the previous transactions. Does this evidence establish a special contract on the part of the defendant to carry through to Buffalo? The supreme court of the United States has twice laid down the rule that in the absence of a special contract the carrier in such a case is liable only to the extent of his own route, and for the safe storage and delivery to the next carrier. *Railroad Co. v. Manufacturing Co.* 16 Wall. 318; *Railroad Co. v. Pratt*, 22 Wall. 123. And the same doctrine prevails in most of the states, as will be seen by reference to the following, among other cases: *Darling v. Railroad*, 11 Allen, 295; *Notting v. Railroad Co.* 1 Gray, 502; *Burroughs v. Railroad Co.* 100 Mass. 26; *Railroad Co. v. Berry*, 68 Pa. St. 272; *Root v.*

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Railroad Co. 45 N. Y. 524; *Babcock v. Railroad Co.* 49 N. Y. 491; *Converse v. Trans. Co.* 33 Conn. 166; *Perkins v. Railroad Co.* 47 Me. 573; *Bank v. Trans. Co.* 23 Vt. 209; *Bimtuall v. Railroad Co.* 32 Vt. 673; *Express Co. v. Rush*, 24 Ind. 403; *McMillan v. Railroad Co.* 10 Mich. 119; *Hoagland v. Railroad Co.* 39 Mo. 451; and *Coates v. Express Co.* 45 Mo. 238.

It is clear that the first carrier may, by special contract, bind himself to carry freight over his own and other lines to its final destination; but upon the question, what will amount to proof sufficient to establish such a contract? there is more difficulty. In the case of *Railroad Co. v. Pratt, supra*, Mr. Justice HUNT discussed the question whether there was evidence enough in that case tending to prove a special contract to carry through, to justify the court in submitting the question to the jury. This question was decided in the affirmative, but whether the evidence would have been regarded by the court as sufficient to establish the special contract, had that been the question, does not appear. It is well settled that, where there is any competent evidence tending to establish the fact in controversy, it is proper to go to the jury, Where a jury is waived, as in this case, the court is to determine not only the competency but the sufficiency of the evidence. In the case of *Railroad Co. v. Pratt, supra*, the following material facts appeared, which are not established in the present case: "*First*, the agent of the railroad company expressly agreed to furnish the plaintiff two good stock cars to carry his horses to Boston; *second*, that on previous shipments the cars furnished by such agent had always carried the horses through to Boston, and that the arrangements made by such agent had always been recognized by the other roads; *third*, at the time of the shipment a way-bill was made out, which showed that the horses were to be 'transported by the Ogdensburg & Lake Champlain Railroad Company (the company sued) from Pottsdam Junction to Boston, via Concord.'"

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It was held that these facts, in connection with the further fact that the plaintiff had been for many years in the habit of transporting horses over defendant's road to Boston, and that a rate for the whole route was agreed upon and paid, would justify the jury in finding that there was an engagement to carry the horses through to Boston. It does not appear from the report of that case, whether the first carrier was paid the price agreed upon for transportation over the whole route, but I infer that such was the case from the remark of the court that the "receipt of the entire pay affords a fair presumption of an entire contract." In the present case the question is whether a special contract on the part of the defendant to carry through to Buffalo is established by proof that the cattle were delivered to defendant; that its agent knew of their destination; and that he named the price to be charged for carrying through to Buffalo, the price having been paid at the end of the route, and to the last carrier. The fact that the defendant gave the through rate with knowledge of the point of destination, is most relied upon by plaintiff. Ordinarily, men contract with reference to the use or disposition of their own property, and do not undertake to control that of others. It follows, I think, that a contract by which one carrier agrees to carry freight over a railroad belonging to and under the control of another, being out of the usual course, must be established by something more clear and definite than by proving the fact that such carrier has named a through rate. It is commonly known that it is the duty of a railroad agent to inform himself and advise all inquirers as to the rates of fare and freight to distant points, and it would be a hard rule that would make the giving of this information equivalent to an agreement to carry to all such distant points.

If it had appeared in evidence that there was an arrangement between the several lines comprising the through route by which each was the agent of all the others to solicit and ship freight over the combined through line, the case would have been very different, and I think that such proof would

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have been sufficient to make out a *prima facie* case for the plaintiff. This for the reason that in such a case each of the several companies may be regarded as operating the whole line as if it was its owner, and therefore its contracts would be presumed to run to the destination of the freight anywhere upon such line, unless the contrary should appear. But, in the absence of any further showing, the naming of the through rate and knowledge of the destination of the freight are not enough.

Motion sustained.

MERCHANTS' NATIONAL BANK OF LITTLE ROCK v. THE COUNTY OF PULASKI.

(*Eastern District of Arkansas. April, 1880.*)

1. COUNTY BONDS — NEW BONDS IN LIEU OF OLD — FAILURE OF COUNTY TO CARRY OUT AGREEMENT — PROPER REMEDY. — Bonds were issued by a county, under an act of the legislature, making it obligatory on the county to levy an annual tax sufficient to pay the interest on the bonds as it accrued, and the principal at maturity. Afterwards, the county proposed to the holders of such bonds that if they would scale them twenty-five per cent., and take new bonds for the reduced sum, the county would annually levy and collect a sufficient tax to pay the interest on the new bonds as it accrued, and the principal at maturity, and that if it failed to do so the holders of the new bonds should be restored to all their rights under the old bonds. New bonds were issued under this agreement, but the county failed to pay the interest thereon, and by reason of the terms of the act under which they were issued could not levy a tax for that purpose. *Held*, an action at law could be maintained on the original bonds, and that a bill in equity, not seeking for any discovery, would not lie.
2. SURRENDER OF VALID EVIDENCE OF INDEBTEDNESS FOR ONE THAT IS INVALID — EFFECT. — Where a valid evidence of indebtedness issued by a county is surrendered by the holder to the county, and a new evidence of debt issued therefor, which is invalid, the legal rights of the creditor are not affected thereby.

Demurrer to bill.

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Prior to the twenty-ninth of May, 1878, the complainant was the holder and owner of divers bonds of the defendant corporation, amounting in the aggregate, including interest, to the sum of about \$43,000. These bonds were of two classes: *First*, bonds issued in pursuance of the provisions of the act of the general assembly of the state, entitled "An act to authorize certain counties to fund their outstanding indebtedness," approved April 29, 1873; *second*, bonds issued under the provisions of an act of the general assembly of the state, entitled "An act to authorize the several counties in the state to fund their outstanding indebtedness," approved March 6, 1875, and an act supplementary thereto.

By an act of the general assembly of Arkansas, approved March 6, 1877 (Acts 1877, p. 21), the several counties of the state were authorized to fund their outstanding indebtedness.

Under the provisions of this act the complainant and defendant made an adjustment and compromise, whereby the complainant agreed, upon certain conditions, to remit twenty-five per cent. of its claim upon all of said bonds of both classes, and the defendant agreed to issue new bonds for the balance due after such remission; and also agreed that it would annually levy a tax of one-half of one per cent. per annum upon all the taxable property of said county, to pay interest and principal of such new bonds. It was further agreed that if such county should make default in the payment of any installment of interest when due, or of the principal of said new bonds, for a period of sixty days, that the said county of Pulaski should forfeit the twenty-five per cent. remitted, and would pay the holder of such new bonds the full amount of the original indebtedness for which they had been issued, and that the acceptance of the new bonds was not to discharge or release said county from any portion of its original indebtedness, unless the interest on said new bonds and the principal thereof should be paid at maturity.

In pursuance of this agreement, new bonds were issued, containing on their face the following stipulation: "The per-

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son to whom this bond is issued having, at the request of said county and its authority, made a concession and reduction of twenty-five per centum of the principal and interest of the bonds presented for funding, the county of Pulaski hereby pledges and binds itself to pay the principal and interest of this bond, as the same becomes due and payable, and to annually levy a tax, payable only in the lawful money of the United States, and faithfully apply the same, when collected, to the principal and interest of this bond; and it is hereby stipulated that this bond is not to be a waiver by the holder thereof of any of the provisions of the act under which the surrendered bonds were issued, and that this bond preserves the obligation of the contract of each and all of said bonds as fully as if set forth herein."

The old bonds were delivered to defendant, and new bonds issued to complainant for the amount of its original claim, less the twenty-five per cent. remitted.

Default for more than sixty days has been made in the payment of the interest on these new bonds, and the county court of Pulaski county has refused to levy the tax provided for in said agreement.

These are the principal facts as averred in the bill and amended bill, which, for our present purpose, are to be taken as true.

It is, however, further averred that the supreme court of the state of Arkansas has declared that the county of Pulaski has no power or authority to levy a special tax of any amount to pay interest upon the bonds issued under the aforesaid act of March 6, 1877, entitled "An act to authorize the counties in this state to fund their outstanding indebtedness," etc.; and that said court has determined that the obligation of the contract, and the taxing power, which were in force and effect at the time of the issue of the surrendered bonds, cannot be carried into the bonds issued under the last recited act.

Complainant now brings into court the new bonds and tenders them to defendant, and claiming its rights under the old

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bonds, and the agreement of compromise, prays a decree for \$43,026.13, that being the amount of the indebtedness now claimed as due and unpaid on the old bonds and interest.

McCREARY, *Circuit Judge*.—The demurrer raises the question whether the complainant has an adequate remedy at law. The new bonds, as already stated, were given in lieu of two classes of bonds previously held by the complainant. I will consider the demurrer as it relates to each class.

1. As to the first class, to wit, bonds issued under the act of April 29, 1873, the contention of the complainant is that by the construction placed by the supreme court of Arkansas upon the act of March 6, 1877, it is deprived of the right to sue at law and recover judgment upon its debt, and to enforce the payment of the same by levy and collection of the taxes which the county agreed to levy and collect for that purpose, to wit, such taxes as were authorized by law when the original bonds were issued. The decision referred to is in the case of *Brodie et al. v. McCabe, Collector* (not yet reported), which was a proceeding by tax payers to enjoin the levy and collection of taxes in excess of the maximum allowed by the Arkansas constitution of 1874.

Section 9 of article 16 of that constitution provides as follows: "No county shall levy a tax to exceed one-half of one per cent. for all purposes; but may levy an additional one-half of one per cent. to pay indebtedness existing at the time of the ratification of this constitution."

Section 6 of the act of March 6, 1877, under which complainant's bonds were funded, and the new bonds now held by it were issued, provides that "it shall be the duty of the county courts issuing bonds under the provisions of this act to levy a special tax of sufficient amount to pay the principal and interest of said bonds as they shall become due, not to exceed the limit of taxation, together with all other taxes levied during that year, prescribed in the constitution of the state."

In commenting upon that clause of the act, the supreme

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court of Arkansas, in the case *supra*, observe that "those who took or might take these bonds evidently submitted to the constitutional limit of taxation under the present constitution;" and undoubtedly such is the fair presumption, unless the contrary is made to appear in any given case by the terms of the contract. It does not appear that any of the bonds issued under the act in question were before the court, and it certainly was not called upon to construe, and did not assume to pass upon, the written contracts under which the complainant claims. The most the court could have intended to assert is that where a creditor of the county funds has bonds under the act of 1877, without any stipulation preserving the obligation of the original contract, those obligations are waived and substituted by such as are consistent with the constitution of 1874. But it was clearly within the power of the parties to agree that the non-payment of the compromise bonds, or of the interest thereon, for a specified period, should annul the new bonds, and restore the parties to their rights before the agreement of compromise was entered into. Such an agreement was not beyond the powers of the defendant corporation, as insisted by counsel for the defense. It would be an unwarranted enlargement of the doctrine of *ultra vires*, to hold that a municipal corporation owing an admitted, valid debt, and having the power to pay or compromise the same, may not bind itself by the terms of such a compromise agreement as that set out in the bill, and shown by the exhibits, in this case. What is that agreement? It is that the complainant shall remit twenty-five per cent. of its demand, and take new bonds for the balance, upon the condition that, if the new bonds are not met, interest and principal, as they mature, "their acceptance shall not discharge or release said county from any portion of its original indebtedness," and that the acceptance of the new bonds "is not to be a waiver by the holders thereof of any of the provisions of the act under which the surrendered bonds were issued." In other words, it is plainly a conditional settlement, to be void if not com-

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plied with by the county. By complying with it, the county can save twenty-five per cent. of the amount of the original debt. By default, it clearly becomes liable to pay the whole amount of the original debt, and also to levy all such taxes as were authorized by law, at the time the original bonds were issued, to raise funds for their payment.

It is well settled that where bonds of a county or a municipality are issued under authority of law and payable out of the proceeds of taxation, the law providing for such taxation enters into and becomes part of the contract, and cannot be subsequently repealed by the legislature or changed by constitutional amendment so as to deprive the bondholder of his remedy. At the time of the contract of compromise, therefore, the complainant had a perfect right to demand the levy for the payment of his bonds of whatever taxes were authorized by law for that purpose when such bonds were issued, even if the same should exceed the limit prescribed by the constitution of 1874. It is also well settled that a change in the form of the contract, or the substitution of one evidence of debt for another, does not ordinarily change the rights of parties.

The complainant's debt against the county remained the same debt notwithstanding the substitution of the new bonds for the old. It was, therefore, perfectly competent for the county to agree to the conditions to which I have adverted, and which are plainly stated in the writing set out with the bill. Whether, under the decision of the supreme court of the state, it is now within the power of the county court to levy and collect the taxes necessary to meet the interest on the compromise bonds, is immaterial. The contract in effect was that a failure on the part of the county, from any cause, to meet the interest or principal of said bonds, should render the compromise void, and leave the parties in the enjoyment of their rights under the original contract. A court of equity can never hold that the contract of compromise was effectual for the purpose of taking away the remedies existing under

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the original contracts, and not effectual for the purpose of securing the payment, in the manner provided, of the reduced amount represented by the new bonds.

From what has been said it will be seen that in my judgment the complainant has an adequate remedy at law. If payment of the past-due interest on the compromise bonds shall be refused on demand, the complainant can declare in an action at law upon the original bonds. No discovery is necessary, for the bill shows that the complainant can describe the bonds and other evidences of debt with sufficient particularity to enable it to prove the sum due thereon, and it can aver that they are in the possession of the county, or have been by it lost or destroyed.

If, in such a suit, the county shall fail to produce said bonds upon being notified to do so, it will be competent for complainant to prove their contents by secondary evidence. The fact that the bonds surrendered to the county at the time of the compromise may appear to have been by it cancelled, will not defeat the complainant's right of action. Proof may be offered, and will be admissible, to prove that the cancellation was in pursuance of the contract of compromise, and is of no force or effect.

As to the second class, to wit, bonds issued under the act of March, 1875, and the act supplementary thereto, these appear to have been issued in lieu of county scrip surrendered. Subsequently to their issue, the supreme court of Arkansas held that the said act of March, 1875, and the supplementary act, were void. Still, it is clear that complainant held a valid claim against the county, for, if the bonds were invalid, it was at liberty to seek its remedy upon the original debt represented by the surrendered scrip. It seems to be conceded by counsel on both sides that the bonds issued under the act of March, 1875, based, as they were, upon a valid, pre-existing debt, could lawfully be funded under the act of March 6, 1877. The point made by complainant's counsel is that the decision of the supreme court in *Brodie et al. v. McCabe, Collector*,

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does not permit the county to carry out the contract of compromise, as to these bonds, by carrying into them the obligations of the contracts upon which they are founded, and out of which they grew, to wit, the county scrip aforesaid. In this I think the counsel is wrong. The original debt, for which these bonds were issued, was subject to the limitations as to taxation, for its payment, contained in the ninth section of article 16 of the constitution of 1874.

The supreme court has in that case decided that the bonds were issued subject to that limitation, and it has decided nothing more. The contract between the parties, referred to in the first part of this opinion, will, as respects this class of bonds, be carried out by a levy up to the limit of the constitution, for as to them the original contract provided no other or better remedy. It follows that the complainant's remedy as to these bonds is at law.

The demurrer to the bill and amended bill is sustained.

KIDDER v. FEATTEAU.

District of Nebraska. May, 1890.)

REMOVAL OF CAUSE—DELAY IN FILING RECORD—REMANDING.—The only necessary consequence of failure to file the record of a case removed from a state court, under the act of March 3, 1875, by the first day of the next term after the application for removal, or within twenty days after such application, is to create a liability on the bond. Unnecessary delay, amounting to laches, in filing such record, prejudicing the other party, may be ground for remanding the case; but the party is not entitled for such cause, as matter of right, to have it remanded. Delay in filing record in this cause *held* not sufficient ground for remanding cause to state court.

Brown & Campbell, for plaintiff.

C. A. Baldwin, for defendant.

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McCREARY, Circuit Judge.—This is a motion to remand the case to the state court, from whence it was removed, on the ground that the transcript was not filed in this court by the first day of the next session after the application for the removal, nor within twenty days from the time of such application.

The third section of the act of March 3, 1875 (18 St. 470), provides that the party filing a petition in a state court for the removal of a cause to the circuit court of the United States, "shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of the then next session, a copy of the record in such suit, and for paying all costs that may be awarded in said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto," etc. The seventh section of the same act provides "that, in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after the filing of the petition and bond in the state court for its removal, then he, or they, who apply to remove the same, shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and, if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in the behalf."

It is admitted that the copy of the record in this case was not filed within the time specified in these provisions of the statute, and in the bond executed in pursuance thereof. It seems, however, to be well settled that the only *necessary* consequence of this delay is a liability of the obligors on the bond. If there is such unnecessary delay in filing the transcript as amounts to unexcused laches, whereby the other party is prejudiced, the federal court may, for this reason, remand the case. The defendant, in this case, cannot demand, as a matter of right, that the case be remanded. It is for the court to say whether, under all the circumstances, there has

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been inexcusable laches. Dillon on Removal of Causes, 74, note 125.

In this case it appears that the petition for removal and the bond were filed in the state court on the eighteenth day of December, 1879, and that the transcript was filed here on the thirty-first of January, 1880. The intervening time was, therefore, forty-three days.

It does not appear, however, that the defendant has been prejudiced by the delay. The suit is brought to enforce the collection of certain promissory notes of the defendant, and to foreclose a mortgage given by him to secure the same. In the absence of any showing to the contrary, I must presume that the defendant in such a case is not damaged by a postponement of the day of trial, and while a long neglect to bring the record into this court, if unexplained, would not be excused, I do not see in the facts of this case any sufficient reason to remand the cause, and this motion is accordingly overruled.

METCALF, Assignee, v. OFFICER & PUSEY.

(District of Iowa. —, 1880.)

1. DORMANT PARTNER — EVIDENCE — GENERAL REPUTATION.— While evidence of general reputation may not be admissible to *prove* a partnership, still it may be competent upon the issue as to whether a *member* of a firm is a dormant partner.
2. SAME — OSTENSIBLE PARTNER — NAME NOT IN FIRM STYLE.— A partner is not to be deemed dormant because his name does not appear in the firm style; nor is it necessary to constitute one a dormant partner that his membership be universally unknown. It is sufficient if he is not an ostensible partner.
3. BANKRUPTCY — FRAUDULENT PREFERENCE.— To constitute a payment made a fraudulent preference, under the bankrupt law, it is necessary to be shown that the person to whom payment was made had reasonable cause to believe the debtor insolvent, and knew that a fraud upon the bankrupt law was intended.

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4. SAME — SAME — SUFFICIENCY OF EVIDENCE.— Evidence in this case held sufficient to sustain the verdict that a payment made was a fraudulent preference under the bankrupt law.

Motion for new trial.

C. C. Cole, for motion.

Mr. Cummings, contra.

NELSON, *District Judge*.— 1. The first issue for the jury to determine — “Is Mrs. M. E. Mead a secret or dormant partner of the firm of A. Bernard & Co.?” — was fairly and properly submitted. I have reviewed the charge to the jury, and the testimony, upon that issue, and find no error. While it is true that general reputation is not admissible, in aid of other testimony, to *prove* a partnership, yet, when the issue is of the character presented here, and the inquiry is whether a *member* of a partnership is a dormant partner, such general evidence is admissible.

The definition of a dormant partner sanctions such proof. He is one whose name and transactions are unknown to the world, at least to such extent that he cannot be regarded an ostensible partner. It is a question of fact for the jury to determine, although the style of the partnership indicated to the world that more than one might be members of the copartnership; and the same class of testimony which would justify a jury in deciding whether a plaintiff knew a defendant was a partner, is competent and admissible to determine whether a partner is dormant.

The evidence of general knowledge in the community was introduced for the purpose of showing the relation of Mrs. M. E. Mead to the partnership; that instead of being an active and ostensible partner she was a dormant and secret one.

The counsel for the defendants urge that, the style of the firm being A. Bernard & Co., Mrs. M. E. Mead could not in

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law be a dormant partner. This is the substance of the claim, although with this qualification: "In a partnership between two persons only, under the style of A. Bernard & Co., one of them cannot, in law, be a dormant partner." I agree with counsel that the legal presumption is that both members of a partnership, composed of two persons under such style, are to be deemed ostensible partners; yet the right to prove that under such style one of the members is a dormant partner is not concluded where more than two persons may compose the firm, and when more than two had been adjudged bankrupts as members of the firm.

The authorities only go to the extent that because a partner's name does not appear in the firm style he is not, on that account, to be deemed a dormant partner, and, therefore, under the style "& Co.," all the actual partners are regarded in law, members sustaining the same relation to the copartnership as if their names were expressed, and are not dormant partners. But it is not necessary that a member of a partnership should be universally unknown to constitute him a dormant partner. If he is not an ostensible partner it is sufficient. See *Goddard v. Pratt*, 16 Pick. 429; 2 Harris & Gill, 172; 20 Vt. 110, and authorities cited; 30 N. Y. 374-80; 5 Gill, J. 383.

2. The next and last issue for the jury—"Was the payment to the defendants a fraudulent preference under the bankrupt law?"

It is urged that the verdict is against the evidence upon this issue. It was necessary for the plaintiff to prove, *inter alia*, that the defendants had reasonable cause to believe that the firm of A. Bernard & Co. was insolvent, and also that the defendants knew that a fraud on the bankrupt act was intended by the payment made to them. These are independent facts, and both must concur to sustain the verdict; and if the evidence does not show that the defendants had knowledge of an intended fraud upon the bankrupt law, as well as reasonable cause to believe the insolvency of A. Ber-

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nard & Co. at the time of payment, a new trial should be granted.

The defendant Pusey was consulted by A. Bernard with reference to the sale of his stock situated in the store at Council Bluffs, or in Nebraska. He knew the firm was embarrassed, and a portion of its indebtedness was overdue. It cannot be said there was not sufficient evidence to induce a reasonable belief that the firm was insolvent. The facts and circumstances were sufficient to create, not merely a suspicion, but belief of insolvency.

Did the defendants know a fraud upon the bankrupt law was intended? They certainly had reasonable cause to believe that by this payment other creditors would be deprived of an equal distribution in the assets of the firm. Pusey testified, "he was of the impression that some one would suffer;" that is, the circumstances and facts within his knowledge produced the effect upon his mind that by this payment to himself and Officer other creditors would suffer.

The amendment to the bankrupt act substituting "knowledge" in the place of "reasonable cause to believe," in this section, was undoubtedly intended to uphold payments which might be fraudulent before the amendment, and since the amendment such facts and circumstances must exist as would induce not merely belief, but knowledge, that a fraud on the act was intended. The principal circumstance to prove this was that Pusey knew there were other creditors who would be deprived of their right to an equal distribution of the proceeds of the bankrupt's estate. The evidence on this point is not doubtful. Pusey admitted it. 15 B. R. 168; 16 B. R. 93; 17 B. R. 163; 18 B. R. 275.

Motion for new trial denied.

Tolman v. Leathers.

TOLMAN v. LEATHERS.

(District of Iowa. May, 1880.)

HOMESTEAD—MARRIED WOMAN—CONTRACT FOR MORTGAGE BEFORE MARRIAGE.—A contract for the loan of money upon mortgage security will not defeat the wife's right of homestead, under the statute of Iowa, upon the subsequent marriage of the mortgagor before the execution of the mortgage.

In equity.

Brown & Campbell, for plaintiff.

Harvey & Lehman, for defendant.

MILLER, *Circuit Justice*.—Leathers, an unmarried man, residing on and owning a quarter section of land (one hundred and sixty acres) in Iowa, made application to Tolman, a citizen of Massachusetts, to borrow of him the sum of \$1,500, on the security of a mortgage on said land. The application was made on the tenth day of September, A. D. 1875, and accepted by Tolman, in writing, on the eighteenth of the same month.

Tolman prepared a mortgage and note to be executed by Leathers, and a draft for the money *to be delivered* to said Leathers, as the bill alleges, *upon the due execution of the note and mortgage*.

The bill further alleges that on the thirteenth day of October Leathers duly executed and delivered said notes and mortgage, and acknowledged the latter, and received the draft for the money.

Default being made on the conditions of the mortgage, Tolman foreclosed it by suit in court against Leathers alone, and bought in the land under the decree. After this he learned that Leathers had married pending the negotiations for the loan—that is, after his acceptance of Leathers' proposition, and before the notes, mortgage and draft were delivered, and before the mortgage was executed and acknowledged.

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Tolman had no knowledge of the marriage when he parted with the money, and the wife had no notice of the agreement for the loan and mortgage at the time of the marriage. She asserts a right of homestead in the forty acres on which the dwelling house stands, and the present bill is brought for the purpose of foreclosing that right, or compelling her to redeem by payment of the mortgage. The case is presented to the court on demurrer to the bill, which sets out the facts in full.

The statutes of Iowa, as construed by the courts of the state, are very positive in asserting the doctrine that all conveyances affecting the homestead, made during coverture, are of no validity against the wife unless she joins in them. And as Leathers was residing on the land at the time of the marriage, there can be no doubt that the wife's right of homestead attached to it at that instant, subject, only, to any paramount right then existing. Her right was a vested right the moment the marriage was consummated, and the marriage is undoubtedly a good consideration, sufficient to support it.

Counsel for plaintiff argues, however, with much force that the transaction between plaintiff and Leathers was so far a completed transaction before the marriage took place that it created an equitable mortgage in favor of the former, which is paramount to the right acquired by the wife.

It is quite clear that unless the transaction concerning the loan had reached a stage in which plaintiff had acquired a vested right in the land before the marriage took place, the right of the wife must prevail. It is probably true, also, that if such right in plaintiff had vested, his lien should prevail. What would constitute a vested right in the nature of an equitable mortgage may not be so easy to define; but I think I cannot be mistaken in saying that unless plaintiff had acquired such a right against Leathers, at or before the date of the marriage, that he could, as the transaction then stood, enforce specifically his right to have the legal mortgage executed by Leathers, or a decree for a specific lien according

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to the terms of their agreement, he did not have such a vested right as will defeat the homestead claim of his wife.

Let us inquire how this was. At the date of the marriage Leathers had agreed to borrow the money and give the mortgage and notes, and Tolman had agreed to loan the money when this was done. No notes and mortgage had been passed, and they were not signed. The draft for the money had been drawn but not delivered. Suppose, as things then stood, instead of the marriage, either Leathers or Tolman had refused to proceed further. If Tolman had written to his agent to return the draft, and refused to loan the money, could Leathers have had a specific performance of the contract by tendering the notes and mortgage? Specific performance here would be a decree that Tolman loan the money and accept the security. I imagine no such case of specific performance can be found.

The reason is obvious. It is a case for damages at law. Mr. Leathers could borrow the money of some one else, and recover for the trouble and expense, and difference in rate of interest, which would be full compensation for Tolman's violation of the contract to lend. It is still clearer that, if Leathers had declined to go further, Tolman could not in a court of equity compel Leathers to accept the money and execute the mortgage. If the case had gone so far that Leathers had received the money, it might be otherwise; but with his own money in his pocket, I do not see how the court could compel Leathers to take it, and then compel him to make the mortgage.

The reason is the same as in the other case. Mr. Tolman could use his money otherwise, and recover from Leathers the injury suffered in losing one contract and taking the other.

It seems to me that in neither is the contract, as it then stood, one on which a court would decree a specific performance, and if so, there could be no vested right at the time in the land in Mr. Tolman. The homestead right, under the Iowa statutes, only extends to forty acres out of the one hun-

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dred and sixty; that is, the quarter section of that quarter section on which the dwelling stands.

The bill makes an attempt to set up rights in plaintiff under a mortgage for eight hundred dollars, to another person, which was paid off by the money loaned by Tolman to Leathers. The facts on which the claim of Tolman to be subrogated to the rights of that mortgage depends are very imperfectly stated, and as I am of opinion that a case may exist in which, after applying the value of the one hundred and twenty acres, not part of the homestead, to be ascertained by a new sale or otherwise, to the extinction of the mortgage which was paramount to the wife's right of homestead, the homestead might be subjected to the remainder, if any, of that eight hundred dollars and interest, the demurrer to the present bill is sustained with leave to amend in regard to this right of subrogation.

McCRAEY, *Circuit Judge*, concurs.

THE FARMERS' LOAN & TRUST COMPANY v. CENTRAL RAILROAD OF IOWA and others.

(*District of Iowa. May, 1880.*)

JURISDICTION.—MASTER IN CHANCERY.—Consent will not authorize a master in chancery to act as a referee at law.

The original suit was a bill in equity to foreclose a mortgage upon the Central Railroad of Iowa. In the course of the proceedings a receiver was appointed to operate the road, and while the road was in his hands, one A. McKay was injured, as is claimed, by the negligence of the receiver's agents, engaged in running a train of freight cars. Subsequently, there was a decree for the sale of the road, saving, however, the rights of all persons who had claims against the receiver

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or the railroad company accruing while the receiver was in charge. The receiver has been discharged, but, in virtue of certain orders and decrees heretofore made in the case, the court is authorized to enforce as against the road and the present owner all such claims.

In January, 1879, McKay petitioned the court for leave to sue the receiver, and the matter was referred to the master to inquire into the facts and report upon the question whether leave to sue should be granted.

After this reference the parties stipulated that said master should hear and determine the whole case, and find the facts, the right to sue being admitted, and that his report should stand as the verdict of a jury. In pursuance of said stipulation the master took testimony, and, after hearing argument, reported in favor of the right of said McKay to recover the sum of \$2,217. Upon this report McKay, by his counsel, moves for judgment.

Mr. Lacy, for petitioner.

Mr. Boardman, for defendant.

McCABY, *Circuit Judge*.—There being no longer any fund in court to be administered, and the receiver having been discharged, the court hold that all actions prosecuted by permission of the court against the railroad company, for damages resulting from personal injuries, must be regarded as common-law actions, in which either party is entitled to trial by jury, unless the same be waived. The chancery powers of the court can be invoked only after judgment, and for the purpose of enforcing the judgment, as provided by the orders and decrees heretofore made. No reference of such a case can be made, without consent, to a master, except for the purpose of reporting the facts, in order that the court may determine whether permission to sue shall be given; but by consent of parties, leave to sue may be given, and a jury may be waived,

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and the case sent to a referee to find and report upon the issues both of law and of fact.

The report of the master in the case of *McKay* must be considered as relating to the question of the right to sue, as it was not competent for the parties, by stipulation, to confer upon the master jurisdiction to hear and determine the merits. The order referring the case to the master was an order out of chancery. Its sole purpose was to advise the court of the facts necessary to be understood before determining the application of petitioner for leave to sue the receiver. It was not competent for the parties, by agreement, to constitute the master a referee at law, or to confer upon him the powers of such a referee. There has been, up to this moment, no action at law in this court between the petitioner and the receiver, or the petitioner and the railroad company. The court itself could not, without violating its well settled rules, intermingle its equity and common-law jurisdiction by trying a common-law action on the chancery side of the court. Much less can the parties themselves do this without the order of the court.

We sent out an order in chancery to a master of this court, and it is now claimed that, in response to this order, a report may be brought in by a referee at law in relation to a common-law action, upon which we may render judgment at law. Not so. The proceedings of the master, in so far as he acted as referee, were unauthorized; as much so as if they had been had before any other person. His report will be considered only so far as it presents matter for the consideration of a chancellor, and is responsive to the order of appointment. Being so considered, it shows clearly that petitioner should be permitted to prosecute his claim by suit at law against the railroad company, and such permission is granted. The parties being before the court, the issues may be joined without delay, and the cause will be submitted to a jury at the present term, unless a jury be waived.

Love, *District Judge*, concurs.

Wallace v. German-American Insurance Co.

WALLACE v. GERMAN-AMERICAN INSURANCE COMPANY.

(District of Iowa. May, 1880.)

INSURANCE, FIRE—CONDITIONS IN POLICY CONSTRUED—PLEADING.—

Where a policy of insurance provides for an arbitration to determine the amount of loss in case differences arise touching the same, "and upon the written request of either party," and also that no suit shall be sustainable until after an award shall have been obtained in the manner above provided, *held*, that the defense that plaintiff has refused to arbitrate cannot be made where neither party has made a written request for such arbitration; and *held*, further, it makes no difference that one or the other party has refused to arbitrate upon a verbal request to do so, or may have refused to make such request in writing.

Demurrer to amended replication.

McCARY, *Circuit Judge (orally)*.—This is an action upon a policy of insurance issued by the defendant, to insure the plaintiff against loss by fire upon a certain building, therein described.

The policy contains numerous conditions, among which is one (numbered 9) from which I quote as follows: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to amount of such loss or damage, but shall not decide the liability of the company under this policy."

The eleventh condition provides as follows: "It is furthermore hereby provided and mutually agreed, that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The amended replication avers that defendant, prior to the commencement of this action, refused to submit to an impartial arbitration any differences touching the loss or damage

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sustained by plaintiff for which this action is brought. To this amended replication defendant demurs, for the reasons — *First*, that it is not shown that any demand in writing was ever made by plaintiff for the arbitration required by the conditions of the policy of insurance; *secondly*, because the defendant was not required by the terms of said policy to make its election to submit matters of difference to arbitration until after a demand therefor had been made in writing by plaintiff.

It will be seen that the policy of insurance sued on provides for an arbitration to determine the amount of loss in case differences arise touching the same after proof thereof, and “upon the written request of either party.” In a subsequent condition it is further provided that no suit shall be sustainable until after an award shall have been obtained in the manner above provided. The two provisions of the policy must be construed together, and thus construed we hold them to mean, that the defense that plaintiff has failed or refused to arbitrate, cannot be made in a case where neither party has made a written request for such arbitration. Neither party is bound to request an arbitration. The most that can be claimed is that either party is bound to arbitrate upon the written request of the other; but whether a refusal to arbitrate would, in any case, defeat the right of action, is a question not now decided. Certain it is that, where neither party has made a written request for arbitration, the clauses of the policy referring to that subject cannot be pleaded or relied upon as a defense.

The eleventh condition of the policy, which provides that no action to recover loss shall be sustainable “until after an award shall have been obtained fixing the amount of such claim in the manner above provided,” must be held to apply only to a case where the written request for arbitration has been made, as provided for in the preceding ninth condition.

The pleadings in this case would indicate that counsel on both sides are proceeding upon the theory that the defense of

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a failure to arbitrate may be set up without a showing that there was a written request made, in pursuance of the policy, for such arbitration. In this they are clearly in error. The question of arbitration cannot figure at all in the case until a written request is alleged. Nor does it make any difference that one or the other party may have refused to arbitrate upon a verbal request to do so, or may have refused to make the request in writing.

The demurrer to the amended replication is sustained.

DARLAND v. GREENWOOD.

(*District of Iowa. May, 1880.*)

PLEADING — CONTRACT CONTAINING MUTUAL CONDITIONS.— In an action for the breach of a contract containing mutual conditions, performance or readiness to perform must be averred by the plaintiff.

Demurrer to petition.

J. E. Owens, for plaintiff.

Starr, Harrison & Danforth, for defendant.

McCREARY, Circuit Judge (orally).— This is a suit brought to recover damages for the breach of a contract. The plaintiff avers in his petition a contract between himself and defendant as follows: Plaintiff held against defendant five promissory notes for \$500 each, and was also the owner of eighty acres of land in the state of Illinois. Defendant owned a house and two lots in the town of Marble Rock, Iowa, in which house he owned and kept a stock of merchandise.

It was agreed between plaintiff and defendant that defendant should sell and convey to plaintiff said house and lots, and the merchandise aforesaid, and that the plaintiff should pay for the same as follows: *First*, to deliver up and cancel said five promissory notes; *second*, to deed to defendant said eighty acres of land, and free the same from incumbrance;

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third, to pay him \$850 in cash; *fourth*, to assume the liabilities against said store, amounting to some \$800 or \$900.

After averring these facts, the petition alleges that "defendant has failed and refused to carry out his bargain with the plaintiff, and complete said bargain so entered into on said July 11, 1879, although requested to do so."

To this petition the defendant demurs, on the ground that the same does not show that the plaintiff has performed, or offered to perform, the said contract on his part. The covenants in the contract, as set out in the petition, are mutual covenants, and go to the whole consideration on both sides. They are mutual conditions, and neither party can recover against the other for their breach, except upon averring performance or readiness to perform, on his own part. The defendant agreed to convey to plaintiff a house and lot, and the merchandise mentioned in the petition, and the plaintiff agreed in consideration thereof, and at the time of such conveyance, to make the payments named.

In such a case, I am clear that the plaintiff cannot maintain an action without showing performance on his part, or an offer to perform. 2 Parsons on Contracts, 532, note (r).

The demurrer to petition is sustained.

CUMMINS, Assignee, etc., v. Lods and others.

(*District of Iowa. May, 1880.*)

CONTRACT — FRAUD — RATIFICATION. — Inexcusable delay will operate as a ratification of a fraudulent contract.

A. B. Cummins, for complainant.

Brown & Dudley, for respondents.

McCREARY, *Circuit Judge (orally)*.—This is a bill in equity filed by complainant, as assignee of the firm of Thornburg & Van Leuven, bankrupts, to set aside the conveyance of

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a certain tract of land, and cancel a contract, on the ground of fraud. The parties who are represented by the plaintiff, as assignee, bought from the respondents an eighty-acre tract of land without seeing it, and upon the faith of certain representations made by respondents. It is alleged that these representations were false and fraudulent, and the prayer is for a decree to set aside the contract and restore the parties to their original rights.

Upon the question of fact involved in the case, as to whether the representations made by respondents concerning the quality and character of the land were intentionally false and fraudulent, there is a serious conflict in the testimony, and upon some of the most material points it would seem to be almost evenly balanced.

It is, however, in my judgment, not necessary to decide that question, since the case may well be disposed of upon a question of law which arises upon the record. The claim of the plaintiff here is that the contract should be rescinded, and set aside, on account of fraud. By the terms of the contract the said bankrupts were to transfer to respondents a certain stock of hardware, and respondents were to convey to the bankrupts an eighty-acre tract of land in Tama county, Iowa. The contract was executed. The transfer of the stock of hardware was made. A deed to the real estate was executed, acknowledged and delivered.

It is a well settled rule of law, that where the right to rescind a contract springs from discovered fraud, the party defrauded must rescind as soon as circumstances will permit; or, in other words, at once, on discovery of the fraud. He is not bound to rescind, and any delay, especially if it be injurious to the other party, amounts to a waiver of his right. "The mere lapse of time," says Mr. Parsons, "if it be considerable, goes far to establish a waiver of this right, and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive." 2 Parsons on Contracts, 781, 782, and cases cited.

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The contract alleged in this case to have been fraudulent was executed on the thirteenth day of August, 1878. It is admitted in testimony that the parties purchasing (the firm of Thornburg & Van Leuven), now represented by the assignee, were fully advised of the condition of the land in about eight or ten days after the date of the contract, which would be as early as the twenty-first or twenty-third of August, 1878. They complained to one of the respondents, and said to him that the land was not as represented, and that it must be made right. This, however, did not amount to a rescission of the contract. It is not necessary to determine precisely what is required to constitute a rescission, but the least that can be said is that it was the duty of the bankrupts in this case, upon the discovery of the fraud, to notify the grantor that they had elected to rescind, demand a return of the stock of hardware which had been delivered to the grantor, and tender a reconveyance to him of the eighty acres of land.

Whether it was necessary to institute legal proceedings, upon the refusal of respondents to recognize such rescission, it is not necessary to decide. It is enough to say that the evidence here does not show any rescission. In less than a week after the said Thornburg & Van Leuven were advised of the alleged fraud they went into bankruptcy, and on the fifth day of October, 1878, the present complainant was elected their assignee. He must be presumed to have inquired into their affairs, and to have ascertained the facts immediately upon his appointment, or within a reasonable time thereafter, especially as no allegation is found in his petition that he did not discover the fraud until a later period. He did not, however, institute this proceeding until the third day of April, 1879, about six months from the time of his appointment.

I am clearly of the opinion that the evidence shows such delay as amounted to a ratification of the contract. On that ground, without deciding the question of fact, I find for the defendant, and there is decree accordingly.

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MURRAY v. HOLDEN and others.

(*Western District of Missouri.* June, 1880.)

REMOVAL — TIME OF FILING PETITION.— Under the act of 1875, a petition for removal must be filed before or at the term at which the cause might first by law be tried, although the pleadings have not been settled at that time.

Motion to remand.

This suit was originally brought to the September term, 1878, of the circuit court of Jackson county, Missouri, and it could have been tried at that term if the issues had been joined and the parties had been ready. At that term the defendants interposed a demurrer to the petition, which was argued and submitted, and taken under advisement by the court. The record does not show what action was taken by the court upon the demurrer, but counsel agree that it was held under consideration until the subsequent March term, 1879, when it was overruled. Whereupon, at the said March term, the defendants filed their petition for removal on the ground that the case is one arising under the constitution and laws of the United States.

The plaintiff moves to remand, upon the ground that the petition for removal was not filed in the state court within the time required by the statute, and upon another ground which need not be considered.

Comingo & Slover, for plaintiff.

Karnes & Ess, Tichenor & Warner, Gage & Ladd and Brumback, Ferry & Black, for defendants.

MCCRARY, Circuit Judge.— The statute of 1875 requires that the petition in the state court for removal shall be filed "before or at the term at which such cause could be first tried, and before the trial thereof." This language has been

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frequently construed by the circuit courts of the United States, but, unfortunately, these courts do not agree as to its meaning. It is impossible to harmonize the conflicting decisions on the subject. In this circuit, according to Judge DILLON's statement in his work on "Removal of Causes," the term referred to is "the term at which, under the legislation of the state, and the rules of practice pursuant thereto, the cause is first triable — *i. e.*, subject to be tried on its merits—not necessarily the term when, owing to press of business or arrears, it may be first reached in its order for actual trial."

I think the practice in this circuit has been uniformly in accordance with the rule here stated, and it must be regarded as well settled. I am disposed to adhere to it, not only because it is the rule heretofore adopted and followed, but also because I consider it a correct exposition of the statute. One of the objects of the act of 1875 was to prevent the abuses which had been practiced under the acts of 1866 and 1867, which allowed a removal at any time before the final hearing. It was evidently the purpose of congress to fix an earlier and a definite time, which would not permit the litigant to experiment in the state court until satisfied he would fail there, and then change his forum. In all the states there is, by law or rule, a trial term — *i. e.*, a term at which a cause may for the first time be called for trial. In practice but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading—so that, as in this case, no issues of fact are joined at that term. It is, nevertheless, the term at which, within the meaning of the law, such cases could first be tried, and, therefore, is the term at or before which the petition for removal must be filed. The statute does not contemplate any delay for the purpose of settling the pleadings in the state court. These can be settled in the federal court after removal, if necessary. If the local law makes the first term after suit is brought an appearance term merely, and declares that the second term is the one at which the case may be brought to trial, then the

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latter is the term at or before which the petition for removal must be filed. But where the first term after service of process is the term at which by law a case is triable, then that is the term to which the act of congress refers.

In other words, the term at which a case can "first be tried" is the first term at which it may by law be tried. The statute should be construed so as to require litigants who have a choice of forums to make their election promptly. Besides, any other rule than the one above stated would cause vexatious delays. If, for example, we should adopt the construction contended for by defendants' counsel, and say that the term referred to by the statute is the term at which an issue of fact is joined, the result would be that litigants might in many cases postpone the joining of such an issue by raising and contesting questions of law in the state court for the purpose of gaining time, as well as of ascertaining the views of the state court before applying for a removal — thus continuing, under the act of 1875, the abuses which, under the previous acts, caused so much and such just complaint.

The motion to remand is sustained.

KREKEL, *District Judge*, concurs.

KEITH and others v. LEVI.

(*Western District of Missouri.* May, 1880.)

1. REMOVAL — WANT OF CONTROVERSY — REVISED STATUTES, § 639.— There is no right of removal, under section 639 of the Revised Statutes, after a stipulation has been filed in the state court admitting the claim sued upon.
2. SAME — ATTACHMENT — CONTROVERSY.— A controversy between citizens of different states, as to the validity of an attachment, may constitute a case removable, within the meaning of the statute, where the amount in dispute, exclusive of costs, exceeds the sum or value of \$500.

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3. SAME — SAME — AMOUNT IN CONTROVERSY — PETITION.— In such case the application for removal should be made upon the attachment issue, and should show affirmatively that the amount in value in that controversy was more than \$500.

Motion to remand.

L. H. Waters and E. Torrence, for plaintiffs.

Huston, Brownlee, Dobson and Lander, for defendant.

MCCRARY, *Circuit Judge*.—The plaintiffs, citizens of Illinois, brought their action against the defendant, a citizen of Missouri, in the court of common pleas of Linn county, Missouri, to recover a debt due for merchandise amounting to \$975.70. The petition alleges that the defendant is about, fraudulently, to convey and assign his property and effects so as to hinder and delay his creditors, and that he is about, fraudulently, to conceal, remove and dispose of his property and effects so as to hinder and delay his creditors. The affidavit for attachment required by the statute of Missouri was filed, and a writ of attachment was issued and levied upon certain goods of the defendant. The defendant filed in the state court a plea in abatement, in which he denied the truth of the allegations in the petition upon which the attachment was issued, and prayed that the attachment might be abated, and that the goods attached might be released, and that he recover costs. Thereupon the plaintiffs filed their petition for the removal of the cause to this court, on the ground of local prejudice, under the third subdivision of section 639, Revised Statutes of the United States. Pending the consideration of this application by the state court, the defendant filed the following stipulation in that court:

“*Edson Keith et al.*, Plaintiffs, v. *Marcus Levi*, Defendant.

“IN THE LINN COUNTY COURT OF COMMON PLEAS, FEBRUARY TERM, 1880.

“Defendant herein, by his attorneys, in open court, and be-

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fore the motion filed herein to remove this cause to the federal court is passed upon by the court, does hereby stipulate and admit that the claim sued upon is just and due to the plaintiffs, and that the amount sued for is correct; and, further, that he has not disputed said debt, and does not intend to dispute the same in any form of answer, but intends to allow plaintiffs to take their judgment for the amount claimed whenever they ask for it.

“MARCUS LEVI, Defendant.

“By his attorneys,

“HUSTON & BROWNEE, with H. LANDER.”

Whereupon the state court overruled the application for removal, and the plaintiffs filed the transcript in this court claiming that their petition and bond were according to the statute, and had the effect to remove the cause and to deprive the state court of further jurisdiction. The defendant appearing specially in this court moves to remand the cause, on the ground that, after the admissions contained in the foregoing stipulation were placed upon the record, there was no controversy or dispute which could be removed to this court.

It is manifest that there could be no removal of the original case, to wit, the suit on the account set out in the petition, after the admission of its correctness by the defendant, and his offer to consent to judgment for the whole amount claimed.

The second section of the third article of the constitution declares that the judicial power of the United States shall extend to controversies between citizens of different states. The act of congress under which the removal was sought in this case, and which was passed in pursuance of said constitutional provision, provides: “Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of \$500, to be made to appear to the satisfaction of said court, may be removed for trial in the circuit court,” etc. The term “dispute,” as employed in the statute, must be held to be exactly synonymous with the term “controversy” in the above mentioned clause of the constitu-

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tion. The plain meaning is, that before a cause can be removed there must be a litigation; that is to say, a matter either of law or fact asserted on one side and denied on the other. Where the matter is alleged by the plaintiff, and admitted by the defendant, there is no controversy, no dispute, and therefore no case for removal.

If, therefore, there was nothing in the case except the question of the right of the plaintiffs to recover judgment for the sum claimed in their petition, I should hold, without hesitation, that they had no right of removal. But there is a controversy as to the truth of the allegations upon which the attachment was issued, and as to the validity of the attachment. Concerning this controversy the parties were at issue in the state court. I see no reason why a controversy as to the validity of the attachment may not constitute a case removable within the meaning of the statute. If the controversy arising upon the plea in abatement, in a case like the present, is between citizens of different states, and the amount in dispute, exclusive of costs, exceeds the sum or value of \$500, I have no doubt the case is removable, even though there be no controversy upon the main case.

That the controversy arising upon the plea in this case is between citizens of Illinois on one side, and a citizen of Missouri on the other, is not disputed. Does the amount in dispute, exclusive of costs, exceed \$500? Before we can answer this question affirmatively it must appear, from the record, that the recovery upon the issue joined upon the plea may exceed that sum. The value of the goods attached is more than \$500, but the value of the goods attached is not the measure of the amount in controversy. The statute of Missouri (vol. 1, § 439) provides that if the issue upon the plea in abatement be found against the plaintiff, he and his sureties "shall be liable on their bond for all damages and costs occasioned by the attachment, or any subsequent proceedings connected therewith." The most that can be said is that the amount in controversy in the question raised upon the validity of the

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attachment is the sum which the defendant may recover as damages resulting from the wrongful issuing of the writ. What that amount is nowhere appears. The defendant has made no formal claim for damages. He prays the return of the goods seized, and for judgment for costs only. If we were at liberty to enter into conjecture as to the probable amount of the damages, in case the attachment is set aside, there is no *data* in the record from which we could, with any certainty, estimate them at more than \$500. The defendant's property was taken by attachment (wrongfully, if the plea in abatement be true); but it was taken to be applied upon a *bona fide* indebtedness.

What his damages would be might depend upon a variety of facts and circumstances which cannot be anticipated. But the court, in determining such a question as this, must not be left to speculation. The party moving for a removal must be able to show affirmatively that the sum in controversy exceeds \$500, exclusive of costs. It is enough to say, in this case, that this does not appear. No sum is claimed as damages, and from aught that appears it may not be the intention of the defendant to claim damages. If he should hereafter, by proper pleading, in this case, or in a suit on the attachment bond, claim more than \$500 damages, in the state court, I think his making such claim will constitute a case which can be removed; but no such claim has heretofore been made. The petition for removal evidently refers to the original cause, which, as we have seen, ceased to be a dispute or controversy the moment the defendant admitted all that the defendants claimed. I have treated it, however, as applying to the issue raised by the plea in abatement, in order that I might dispose of the question upon the most favorable view for the plaintiffs. Strictly speaking, the application fell to the ground when the defendant's admission of the plaintiffs' claim was filed, and a new application for the removal of the cause upon the attachment issue should have been made, and should have shown affirmatively that the amount in value in that contro-

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versy was more than \$500. There is, in fact, no application for the removal of the case, as it stands, upon the plea in abatement. The petition is for the removal of the original or main cause, which is not removable because it does not involve a controversy.

The motion to remand is sustained.

KREKEL, *District Judge*, concurs.

SCHUELENBURG & BOECKLER v. MARTIN and others.

(*District of Kansas. June, 1880.*)

1. MORTGAGE—FUTURE ADVANCES. — A mortgage given to secure future advances, at a time when no indebtedness existed, is valid.
2. DEBTOR AND CREDITOR—APPLICATION OF MONEY. — Where money has been received in part payment of a running account, and no specific application has been made of the same, a chancellor can, in his discretion, apply such money to that portion of the account which remains unsecured, without regard to the order of time in which the indebtedness for the several items of account was incurred.
3. MORTGAGE—DECEDENT'S ESTATE—PROOF OF DEBT.—Proof of a debt against the estate of a deceased mortgagor, and receipt of a dividend from the assets of the same, does not extinguish a mortgage given to secure a part of such debt.

Mr. Guthrie, for complainant.

Mr. Martin, for respondents.

McCRAEY, *Circuit Judge*.—This is a bill to foreclose a mortgage executed by Hugo Kullak to the plaintiffs. The defendants are the heirs at law of the mortgagor, who, since the execution of the mortgage, has deceased.

The evidence shows that plaintiffs, and the said Kullak, about the first day of April, 1869, entered into a contract as follows: The plaintiffs, who were dealers in lumber at St. Louis, Missouri, agreed to furnish to said Kullak, who was engaged in the same business at Topeka, Kansas, such quantities of lumber as he might order for a period of one year, on

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a credit of sixty days, provided no order for more than \$5,000 worth of lumber should be made at any one time, and the indebtedness at no time during said year to exceed said sum of \$5,000. To secure the payment of all bills or accounts for lumber ordered and delivered under this arrangement, the mortgage sued on was executed. Numerous lots of lumber were ordered and furnished during the year covered by the mortgage, and payments were made on account, from time to time, but at the end of the year there was a balance due the plaintiffs of considerably more than \$5,000. No settlement was made at the end of the year, but the account was continued through three additional years, and up to July 13, 1873, when the mortgagor died, being then indebted to plaintiffs, on the account, in the sum of \$17,832.62. During the period covered by these transactions lumber was ordered by said Kullak, and furnished by plaintiffs, amounting in the aggregate to over \$190,000, and payments thereon were made, from time to time, by Kullak, aggregating over \$172,000. The parties frequently discussed the state of the account after the expiration of the year covered by the mortgage, and Kullak often said he considered the mortgage as security for \$5,000 of his indebtedness, but no formal settlement was ever made, nor was any specific application of the payments to any particular portion of the account ever directed by Kullak or made by plaintiffs.

The plaintiffs have proved their whole claim against the estate of Kullak in the probate court of Shawnee county, Kansas, and the same has been allowed; no proof that the same, or any part thereof, was secured by mortgage, being made in that court. It appears, from the agreement of parties on file, that the whole amount of the plaintiffs' claim against said estate, as proved and allowed in the probate court, was \$19,700.44, including the account in controversy here, and that the plaintiffs have received from the administrator two dividends upon the whole sum, amounting to \$5,319.11. My conclusions are as follows:

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1. It is no objection to the validity of the mortgage that it was given to secure future advances, no present indebtedness subsisting at the time of its execution. *Conrad v. Atlantic Ins. Co.* 1 Pet. 386. This doctrine is now well settled, and it is not necessary to cite the numerous authorities in its support. It is not disputed by counsel for defendants.

2. The payments made after the expiration of the year covered by the mortgage, should, under the circumstances, be applied to the liquidation of the unsecured portion of the account. There is some conflict of authority upon the question of the appropriation of payments in such a case. It is clear that the debtor may direct the application of money paid by him to a creditor having several claims against him; and it is also clear that if the debtor gives no direction he is presumed to leave the question to the discretion of the creditor, who may make the application. But there are cases which hold that where the debtor has given no direction, and the creditor has made no particular application, the court should presume, in favor of the debtor, that he intended to extinguish that debt which would bear most heavily upon him; as, for example, a mortgage or judgment. *Patterson et al. v. Hull et al.* 9 Conn. 747; *The Antarctic*, 1 Sprague, 206. But a different rule has been adopted by the supreme court of the United States. In *Field et al. v. Holland et al.* 6 Cranch, 8, Chief Justice MARSHALL, in delivering the opinion of the court, said: "It is contended by the plaintiffs that if the payments have been applied by neither the creditor nor the debtor they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves upon the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it

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devolves upon the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." And see *Mayor, etc. v. Patton*, 4 Cranch, 317; *The U. S. v. January et al.* 7 Cranch, 572. This rule has been applied by the supreme court of Kansas. *Shellabarger v. Binns*, 18 Kan. 345.

3. It is insisted by counsel for defendants that this rule is only applicable to a case where there are several separate and distinct debts, and that it is, therefore, not a proper guide for the determination of the present case, which is one of a continuous or running account. In such a case it is insisted that the payments must be applied to the extinguishment of the first or oldest items of the account. The general rule, that payments made on an open running account are presumably to be applied to the extinguishment of the items thereof in the order of their dates, is well settled: *Postmaster General v. Farlen*, 4 Mason, 333; *The U. S. v. Wardwell*, 5 Mason, 85; *The U. S. v. Kirkpatrick*, 9 Wheat. 738; *Jones v. The U. S.* 7 How. 681. But a different rule must prevail, under the authority of *Field et al. v. Holland et al.*, in a case where the earlier items of the account are secured, and the later items unsecured. Besides, the question of the application of the payments, in such a case, rests largely in the discretion of the chancellor, and in this case the proof shows, as already suggested, that the parties intended to preserve the security of the plaintiffs' mortgage to the extent of \$5,000 of the indebtedness, and it is clearly equitable to apply the payments so as to carry out that intention. It may be added that we have here two separate contracts; first, the mortgage and the indebtedness secured thereby; and, secondly, the open account not connected with, or secured by, the mortgage. Viewed in this light, we may, for the purpose of applying the payments, separate the secured from the unsecured portion of the account, and treat them as separate debts.

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4. The fact that plaintiffs proved their entire debt as against the estate of Kullak, and received two dividends thereon from the assets of said estate, does not extinguish their rights under the mortgage. The sum collected from the estate upon that portion of the debt which is secured by the mortgage must, however, be credited thereon. It appears from the stipulation of the parties that the plaintiffs have received from the assets of the estate twenty-seven per cent. of the entire claim, including the five thousand dollars covered by the mortgage sued on, or one thousand three hundred and fifty dollars on account of said mortgage debt. This must be credited, and the plaintiffs are entitled to a decree for the balance, to wit, three thousand six hundred and fifty dollars, and interest from April 1, 1870. The plaintiffs have offered to take a decree for five thousand dollars, which, being less than the sum thus found due, including interest, the decree will be for that sum, with costs.

THE FARMERS' LOAN & TRUST COMPANY v. THE CENTRAL
RAILROAD OF IOWA.

(*District of Iowa. May, 1880.*)

1. RECEIVERS—ORDER OF COURT AS TO ACCOUNTING BEFORE MASTER CONSTRUED.—Order of court requiring the receivers of a railroad, which had been sold under a decree of foreclosure, to "pass their accounts before the master," *held* to apply only to such accounts as had not been passed prior to said order. It did not require a re-examination of any accounts.
2. RECEIVER'S REPORT, HOW ASSAILED.—A receiver's report, which has been passed by a master, is only assailable by a direct proceeding in court alleging error, fraud, mistake or the like.

In the matter of the petition of J. B. Grinnell, asking an order restraining the master from reporting on accounts of Grinnell, ex-receiver, which had been made and previously reported upon.

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MILLER, *Circuit Justice (orally)*.—The order or final decree under which the master's proceedings were had, provides that the receivers shall account before the master, and that the new corporation may contest or correct their accounts. It undoubtedly gives them the right to appear and contest the matter. The question to be considered—the main question—and perhaps the only one, is, what was meant by that order of the court? And, in order to determine what was meant, we must consider what was the condition of things in regard to receiverships, because there were more than one, and the language of the order is in the plural, that—"the receivers shall appear and account before the master."

There had been three receivers, no one of whom has been discharged. One of these receivers, Mr. Grinnell, had made monthly presentations of his accounts, which had been referred to the master, and were passed upon by the master, and confirmed, with the exception of the last one. That one had been passed upon and confirmed, except as to a few items to which the receiver himself took exceptions. The two other receivers had never made any final account. As regards them, their last accounts were open and not passed upon. The last receiver in the case, Mr. Morrill, has, as far as I know, presented no account at all. If he has, there is nothing to show but what his account is open to determination.

Under that state of the case the court came to make a final decree (as near as it could make a final decree). Coming to make a final decree they tried to conclude as much as they could. Among other things, none of these receivers were discharged, and they made this order that the receivers should appear before the master and pass their accounts. What did the court mean by that, under that condition of affairs? Did they mean to make an order equivalent to this, that *all* the accounts of *all* the receivers for *all* the time shall be open for re-examination? That is contrary to the usual course of proceedings in court; contrary to the mode of dealing with accounts; and if the court had meant it, it would have been

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very easy to say that the accounts of all these receivers are *all* of them open to full investigation, and they shall all come and pass their accounts, as they have never been settled at all.

That would have been the proper way to say that thing if the court meant it. Certainly, if I had been on the bench, I should have said it if I meant that.

In addition to that there was no proceeding before the court asking such a thing. There was no application before the court assailing these accounts either for error or for fraud. It is simply a general order, purporting to be made at the request of nearly all the parties to the whole transaction, that the accounts of the receivers should be passed before the master. Now the court cannot carry in its mind, and it is not to be supposed that it can, the knowledge of accounts filed month by month, passed upon month by month by the master, and by him confirmed. It is not to be supposed that although the court must take judicial notice of these things, that they did actually know that such was the condition in regard to Mr. Grinnell's account, and that they knew such was not the condition in regard to other accounts, or that they knew there was any distinction between the three.

It is not to be supposed that the court had that in its mind, but it is fair to suppose that they would pass an order including all the receivers, and instructing them thus. The receivers will pass their account subject to the rules of law concerning those accounts. If there is a receiver here who has any account which has not been passed before the master, he will pass the account and let it be settled. If there are two they will be settled. If there is a receiver, all of whose accounts are passed but the last account, he will settle as to that. If there is a receiver who has an account all of which is passed he does not need to settle, and the order does not affect him, except in general terms. I cannot suppose the court meant that all the receivers, every one of them, should appear before the master and re-open all their reports. Suppose you go that far, what rule should the master adopt? A

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different one from what had been adopted before in passing accounts? On the contrary, for all of them the rule would be that, as to those which have already been passed upon, it is settled, and I will report the fact that it is settled; and as to those which have not been passed upon, you must come up and settle.

With that view of the subject, about which I am very clear, I am supported by Judge McCrory, and the result is we instruct the master, Mr. Lomax, that he has nothing to do with Mr. Grinnell's accounts. What is open, as I understand, of Mr. Grinnell's case, is simply his own exception to the last report of the master. Why it has not been disposed of, and why nobody takes any measures to dispose of it, we cannot say. We instruct the master that he has nothing further to do in the present condition of affairs with Mr. Grinnell's accounts.

Possibly it may be my duty, after the argument made here yesterday as to the proper mode of proceeding, to say that the mode of revising the report of the master on the receiver's account may be different from revising his report on any other subject. It is unnecessary to decide this, because even the authorities read by Judge Cole show that the receiver's report stands in the same attitude as if it had been passed by the master, and that it is only assailable by direct proceeding in court, in the nature of a petition, calling its attention to some error, fraud or mistake, or anything of the kind, and we are of opinion that no other mode of assailing these accounts exists but a direct proceeding in court and before the court, showing special reasons why the report should be re-examined.

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UNITED STATES *ex rel.* MERCHANTS' NATIONAL BANK v. JEFFERSON COUNTY.*(Eastern District of Arkansas.)*

1. COUNTY BONDS TAX—STATUTORY CONTRACT—REPEAL.—Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds, as the same become due," the power of taxation, thus given, enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted.
2. TAX MUST BE LEVIED NOTWITHSTANDING REPEAL.—In such case, it is the duty of the county court to levy, and cause to be collected, a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and if it does not perform this duty, it may be compelled to do so by *mandamus*.

On the twenty-sixth day of October, 1877, the relator recovered a judgment in this court against Jefferson county for \$5,120.70, and costs, on negotiable bonds issued by said county in pursuance of the provisions of the act of the general assembly of this state, entitled "An act to authorize certain counties to fund their outstanding indebtedness," approved April 29, 1873.

By the terms of this act the board of supervisors of the counties named therein was authorized "to issue the bonds of such counties in any sum necessary to pay the outstanding indebtedness of such counties," etc.

The bonds were to be made payable in not less than three nor more than ten years, and to bear interest at the rate of eight per cent. per annum, payable semi-annually.

The fifth section of the act declares: "It shall be the duty of the board of supervisors issuing bonds under the provisions of this act, to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due. Such tax shall be collected in the lawful currency

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of the United States, and shall not be appropriated to any other purpose than that for which it was levied. If any board of supervisors neglect or refuse to levy the tax herein provided for, the holder of any such bond shall have the right to compel such levy by a writ of *mandamus*," etc.

The constitution of the state, adopted October 30, 1874, abolished the board of supervisors, and devolved all their duties and jurisdiction on the county courts, and declared they should "be regarded as a continuation of the board of supervisors." Section 23 of schedule to constitution.

It also provided that "No county shall levy a tax to exceed one-half of one per cent. for all purposes, but may levy an additional one-half of one per cent. to pay indebtedness existing at the time of the ratification of this constitution." Article 16, section 9.

The act under which the bonds were issued was passed, and the bonds issued, before the adoption of the present constitution.

The constitution of 1868, in force at the date of the passage of this act, unlike the present constitution, contained no limitation on the power of taxation for county purposes; any rate was lawful that was authorized by act of the legislature.

Upon the relation of the judgment plaintiff, a rule issued, directed to the county judge of the county, requiring him to show cause — if any he could — at a time stated in the rule, why a peremptory *mandamus* should not issue out of this court requiring the county judge and justices of the peace of the county composing the county court for the levy and appropriation of taxes, to convene at the time and place fixed by law for the meeting of said court for the annual levy of the county and other taxes, and, when so convened, to proceed in conformity to the requirements of the fifth section of the act under which the bonds were issued, to levy a special tax on all the taxable property of the county, payable only in United States currency, sufficient to pay the relator's judgment.

This rule was duly served on the county judge. No

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response to the rule has been filed, and the relator moves for judgment awarding the peremptory writ.

John McClure, for relator.

CALDWELL, *District Judge*.—It is a popular but erroneous opinion that the restriction on the taxing power of counties, contained in the constitution of 1874, repeals or annuls the provisions of the act of 1873, making it the duty of the county court to levy a special tax sufficient to pay the interest and principal of the bonds issued under this act, as the same becomes due.

This erroneous view, in one instance heretofore, occasioned costs and inconvenience, and to prevent misconception on the subject in the future, it is deemed proper to state, with some fullness, the law applicable to this class of cases.

It has long been settled by repeated decisions of the supreme court of the United States, and of many of the states, that the usual provision, contained in acts authorizing counties to issue negotiable bonds, making it the duty of the proper county court, or board, to levy an annual tax sufficient to pay the principal and interest of such bonds as the same falls due, enters into and becomes a part of the obligation of the contract between the county and the holder of the bonds; and the power and duty of the proper county authorities to levy the tax required by the terms of the act authorizing the issue of the bonds, cannot subsequently be withdrawn, so long as a single bond remains unpaid.

When bonds are issued under such an act, the act itself becomes a part of the contract, as much so as if it had been written out at length on the face of the bond, and it cannot be repealed or abrogated by any law of the state — neither by act of the legislature nor constitutional provision — until the obligations incurred under it are paid and discharged according to their terms.

The supreme court of the state has recently decided that

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the act under which these bonds were issued was legally passed under the constitution then in force; that it is a constitutional and valid law, and that a tax levied by the county court to pay the interest on the bonds was a valid and legal tax. *Badgett v. Worthen*, 32 Ark. 496.

The constitution of the United States declares that "No state shall pass any *ex post facto* law, or law impairing the obligation of contracts." Article 1, section 10, constitution United States. And it further declares that "This constitution and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding;" and that "all executive and judicial officers, both of the United States and of the several states, shall be bound by oath, or affirmation, to support this constitution." Article 6, constitution United States.

In this state the public property of the county cannot be sold on execution to pay the debts of the county, and the only mode of discharging such debts is by the levy of a tax on the taxable property of the citizens of the county. It is obvious that the bond of a county would be valueless unless there existed a legal right to require the levy of a tax to pay it; and, as to such contracts, this right is the principal, if not the only, element of their value, and constitutes the vital part of the obligation.

This right to the full extent to which it was granted by law for this purpose, at the date of the issue of the bonds, is protected from invasion or impairment by the constitution of the United States.

In *Von Hoffman v. The City of Quincy*, the precise question here involved was presented to the supreme court of the United States, and that court, in an opinion concurred in by every member of the court, said:

"When the bonds in question were issued there were laws in force which authorized and required the collection of taxes,

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sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the fourteenth of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

"It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed.

"A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the constitution a shadow and a delusion." *Von Hoffman v. City of Quincy*, 4 Wall. 535.

And the doctrine laid down in the case last cited has been re-affirmed in numerous cases. In *Riggs v. Johnson County*, 6 Wall. 166, 194, Mr. Justice CLIFFORD delivering the opinion of the court, states the rule in these words: "Where a state has authorized a municipal corporation to contract and to ex-

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ercise the local power of taxation to the extent necessary to meet the engagements, the power thus given cannot be withdrawn until the contract is satisfied." And this is the settled doctrine of all the courts. *City of Galena v. Amy*, 5 Wall. 705, 709; *Rees v. City of Watertown*, 19 Wall. 107, 120; *Lansing v. County Treasurer*, 1 Dillon, 522; 1 Dillon on Mun. Corp. sec. 41, and note; Burroughs on Taxation, p. 426, sec. 139; *Hasbrouck v. Milwaukee*, 25 Wis. 122; *Western Saving Fund v. Philadelphia*, 31 Pa. St. 175; *Beckwith v. English*, 51 Ill. 147; *Vance v. City of Little Rock*, 30 Ark. 440, 441.

It is no answer to say that the present constitution does not utterly destroy the right given by the act under which the bonds were issued—that a limited tax may still be levied. If, by any subsequent act of the state, the rate could be limited to five mills, it could be limited to one, or taken away altogether. "One of the tests that a contract has been impaired," say the supreme court of the United States, "is that its value has by legislation been diminished. *It is not by the constitution to be impaired at all.* This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force. * * * And the test, as before suggested, is not the extent of the violation of the contract, but the fact that in truth *its obligation is lessened in however small a particular.*" *Planters' Bank v. Sharp*, 6 How. 327.

And the same court, in a recent case, held a provision of the constitution of the state of North Carolina, exempting property from sale on execution, void as to debts contracted *before* its adoption; and the court, in this case, state the rule to be, that "the remedy subsisting in a state when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as to substantially impair and lessen the value of the contract, is forbidden by the constitution, and is, therefore, void." *Edwards v. Kearzy*, 6 Otto, 595.

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Nor does it affect the question that the law of the state impairing the obligations of a previous valid contract is made part of the constitution of the state, not even though congress has authorized and ratified such constitution. On this point the supreme court of the United States say: "Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. That instrument is above and beyond the power of congress and the states, and is alike obligatory upon both. A state can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the national constitution." *Gunn v. Barry*, 15 Wall. 610, 623; *Jefferson Bank v. Skelley*, 1 Black, 436; *Dodge v. Woolsey*, 18 How. 331.

The supreme court of appeals of Virginia, in a recent case, held the provision of the constitution of that state, allowing property to the value of \$2,000 to be held exempt from execution for debts contracted before its adoption, was in conflict with the constitution of the United States and void, as respects its application to such debts. The court said: "The fact that an enactment tending to impair contracts is embodied in the constitution of a state, does not protect it. The prohibition of the United States constitution is upon the states, irrespective of the form its laws may take or the agencies which enact them. A state has no more power to impair the obligation of a contract, by a constitution, than by a legislative act;" and the unanimous opinion of the court concludes in language as marked for the force with which it inculcates the moral and social duty of observing the obligation of contracts — both public and private — as for its clear enunciation of the rule of constitutional law applicable to them: "No state and no people can have any real and enduring prosperity, except where public faith and private faith are guarded by laws wisely administered and faithfully executed. The inviolability of contracts, public and private, is the foundation of all social progress and the corner-stone of all the forms of civilized

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society, where an enlightened system of jurisprudence prevails. Under our system of government, it has been wisely placed under the protection of the constitution of the United States, and there it rests, secure against all invasion." *The Homestead Cases*, 22 Gratt. 301.

It is a remarkable fact that this state has, by her legislative enactments and constitutions, contributed largely to the exposition and elucidation of that clause of the constitution of the United States that declares "no state shall pass any law impairing the obligation of contracts."

Among the earliest acts of the legislature of the state, was one passed in November, 1836, incorporating "The Bank of the State of Arkansas." The twenty-eighth section of the act provided "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas."

The bank failed in 1839, leaving a large amount of its issues outstanding, which sunk in value until they became almost worthless.

It was obvious if the state kept her pledge, and continued to receive these worthless bills in payment of debts and taxes due her, no revenue could be collected to support the state government.

In this emergency, the legislature of the state, on the tenth of January, 1845, repealed the twenty-eighth section of the act incorporating the bank, which declared its bills should be received in payment of all debts due the state, and enacted that nothing but current money of the United States should be received in payment of state taxes. Public sentiment, no less than the necessities of the state, seemed to demand this action; and the supreme court of the state held the repealing act valid, and that the state was no longer bound to receive the bills of the bank in payment of debts due her. *Woodruff v. Attorney General*, 8 Ark. 236.

But the case was appealed to the supreme court of the United States, and that court reversed the judgment of the

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supreme court of the state, and held that the last act was in conflict with the constitution of the United States, and void, because it impaired the obligation of the contract the state had made, by the terms of the twenty-eighth section of the first act, with every one who became a holder of these bills, to receive them in payment of all debts due her; and that a tender of the bills of the bank in payment of a debt due the state after the repealing act was passed was a good and legal tender. *Woodruff v. Trapnall*, 10 How. 203.

Whether the constitution of a state, or an act of its legislature, conflicts with the constitution or laws of the United States, is a federal question, the ultimate and final decision of which, by the constitution and laws of congress, is vested in the supreme court of the United States, whose decision is binding on all other courts, both federal and state. And the supreme court of the state, when this cause came before it, again declared "the decision of the supreme court of the United States conclusive upon the point." *Woodruff v. Trapnall*, 12 Ark. 640.

And as the result of the judgment of the supreme court of the United States, the state was compelled to, and did redeem this worthless bank paper.

Other legislation of the state in reference to this bank, furnishes another illustration of the impotency of state laws to impair the obligation of contracts. The state being the sole owner of the stock of the bank, assumed to herself, by act of her legislature, the right to administer the whole assets of the bank, without regard to the rights guaranteed to the holders of the bills of the bank, under the charter. The supreme court of the state maintained the validity of this legislation. *The State v. Curran*, 12 Ark. 32.

But, on appeal to the supreme court of the United States, that court reversed the judgment of the supreme court of the state, and declared such acts of the legislature "impaired the obligation of contracts made with the lawful holders and bearers of bills of the Bank of the State of Arkansas, and

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so were inoperative and invalid." *Curran v. State of Arkansas*, 15 How. 304.

And the supreme court of the state gave full effect to the judgment of the supreme court of the United States, and caused it to be carried into execution, its own decision and "the laws of the state to the contrary notwithstanding." *The State v. Curran*, 15 Ark. 20.

In 1851, the legislature of the state passed an act relating to the swamp lands of the state — one section of which provided that to encourage persons to purchase the swamp and overflowed lands the same should be "exempt from taxation for the term of ten years, or until said lands be reclaimed."

Many persons purchased these lands on the faith of this promise of the state not to tax them for the period named. Public opinion changed, and in 1855 the act which exempted the swamp lands from taxation was repealed, and such lands purchased under the act of 1851 were declared subject to taxation.

The supreme court of the state held the act of 1855 was in conflict with the constitution of the United States and void.

Mr. Justice COMPTON, who delivered the opinion of the court, said: "The constitution of the United States declares that no state shall pass any law impairing the obligation of contracts. * * * This prohibition on the law-making power is justly ranked among the wisest provisions contained in the federal constitution. Without it, private rights would at all times be liable to invasion by the enactment of laws consequent upon the *fluctuating policy, strong passions and sudden changes*; and with it nothing more is required than the observance of an elevated morality." *State of Arkansas v. County Court of Crittenden County*, 19 Ark. 360.

In this one short sentence the learned judge fully vindicates the wisdom, justice and necessity of this provision of the constitution of the United States.

Another case afterwards arose under these same swamp land acts.

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The act of 1851 provided for contracts for the making of levees and drains and for the payment of contractors in scrip, which it was declared should be received in payment for swamp lands. The fourteenth section of the same act, as we have seen, exempted swamp lands from taxation for the period of ten years, and this section, as before stated, was repealed by the act of 1855.

In this state of the statutes, the question arose, whether swamp lands, purchased after the repeal of the fourteenth section with levee scrip issued before the repeal, were subject to taxation; in other words, whether the repealing act did not impair the obligation of the contract of the holder of the scrip under the first act? The supreme court of the state decided that it did not have that effect and that the lands were subject to taxation. *McGee v. Mathis*, 21 Ark. 40.

This case was appealed to the supreme court of the United States, where the judgment of the supreme court of the state was reversed.

Chief Justice CHASE, who delivered the unanimous opinion of the court, said: "The contract of the state was to convey the land for the scrip and to refrain from taxation for the term specified. Every piece of scrip was a contract between the state and the original holder and his assigns. Now, what was the effect of the contract when made? Did it not bind the state to receive the scrip in payment for swamp land, exempted for a limited time from taxation? The scrip if not receivable for lands was worthless. To annul the quality of receivability was to annul the contract. But the exemption of the lands for which it was receivable from taxation was a principal element in its value; and repeal of the exemption was the extinction of this element of value. This was clearly an impairment of the contract. The state could no more change the terms of the contract by changing the stipulated character of the land to be conveyed in satisfaction of the scrip as to liability to taxation, than it could abrogate the contract altogether by refusing to receive the scrip at all in payment for land. We are

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constrained to regard the repeal of the exemption act, so far as it concerns lands paid for, either before or after the repeal, by scrip issued and paid out before repeal, as impairing the contract of the state with the holders of the scrip." *McGee v. Mathis*, 4 Wall. 143.

The constitution of this state adopted and in force in 1868, declared: "All contracts for the sale or purchase of slaves are null and void, and no court of this state shall take cognizance of any suit founded on such contracts." * * * Art. 15, sec. 14.

By this provision the framers of that constitution sought to invalidate and destroy the obligation of contracts for the sale and purchase of slaves, that were valid contracts, under the constitution and laws of the state in force at the time they were made.

The effort proved futile. The supreme court of the state declared this section of the constitution of the state impaired the obligation of contracts, and was for that reason in violation of the constitution of the United States and void; and such contracts were enforced according to their legal effect and obligation, under the constitution and laws in force at the time they were made. *Jacoway v. Denton*, 25 Ark. 625; *Sevier v. Haskill*, 26 Ark. 133; *Pillow v. Brown & Childress*, id. 240.

And the supreme court of the United States decided the same question, in the same way and for the same reason. *White v. Hart*, 13 Wall. 646.

In no one of the cases cited in which legislative acts and a section of the constitution of this state were declared to be in conflict with the constitution of the United States and void, was there a plainer or more palpable violation of that instrument than there is in this case. For when it is said that "to levy a special tax of sufficient amount to pay the principal and interest of said bonds as the same become due"—as is expressly required by the terms of the act under which the bonds were issued—will require a levy in excess of the limit

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allowed by a constitutional provision *subsequently* adopted, the statement is a confession that this provision of the constitution, when applied to these contracts, impairs their obligation, and is, therefore, so far as it relates to them, null and void.

If a natural person gives his bond, agreeing to pay a given sum of money on a day certain, it will not be pretended that the state could, by a law afterwards enacted, extend the time of payment; and if, upon the non-payment of such bond, the holder should put it in judgment, would it be contended that by such a law the state could deny to the judgment plaintiff the right to have execution for his whole debt, and to levy upon and sell sufficient property to make it?

By the law of this state, counties are declared to be bodies "corporate and politic," and endowed with power to contract and to sue and be sued.

In this case the county was by law specially authorized to issue these bonds, and to stipulate for payment of the interest and principal at fixed and stated times; and it was made its duty to levy a tax sufficient to meet these payments, according to the stipulation of the bonds. Upon what principle can the state, by a subsequent enactment, relieve the county from the obligation to pay the bonds at the time and by the means agreed upon, any more than it could relieve a natural person from the obligation to pay his debt according to the terms of his contract.

Confessedly in the case of a natural person, a state law passed after the debt was contracted, declaring that not more than five mills on the dollar of the aggregate value of the defendant's property should be taken on execution in any one year for its satisfaction, would be a nullity; and if a nullity in that case, why not a nullity in the case of a county? The protection afforded to the obligation of contracts by the constitution of the United States is not limited to the contracts of natural persons, but extends as well to all corporations, public or private, endowed by law with power to contract.

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The constitutional limit is applicable, of course, to ordinary county warrants issued prior to the adoption of the constitution. These warrants having been issued for ordinary county purposes and not under any special act, law or contract, requiring the levy of a tax to pay them, they fall within the provision of the constitution, and a five mill tax, and no more, may be levied to pay them. And but for this provision in the constitution it is doubtful what remedy, if any, the holders of these warrants would have had to enforce their payment. *United States ex rel. Sisters of Charity of St. Joseph v. County Court of Ouachita County*, April Term, 1876.

If the county court of Jefferson county, or of any other county in this district to whom peremptory writs of *mandamus* may issue in this class of cases, entertains any doubt as to whether the supreme court of the United States will adhere to its many well considered judgments, declaring the duty of this court, and of county courts as well, in this class of cases, there is a ready means of settling that doubt. The act of congress gives the county the right to appeal from the judgment of this court awarding the peremptory writ, to the supreme court of the United States; and if the required steps for that purpose are taken within sixty days after the rendition of the judgment awarding the writ, all proceedings under the writ are stayed until the determination of the cause in that court.

That is the only tribunal that can review the judgment of this court; it cannot be reviewed nor the process upon it enjoined or otherwise obstructed or impeded by the orders or process of any other court. *Riggs v. Johnson County*, 6 Wall. 166; *Weber v. Lee County*, id. 211; *United States v. Keokuk*, id. 514; *Supervisors v. Durant*, 9 Wall. 415; *The Mayor v. Lord*, id. 409; *Amy v. Supervisors*, 11 Wall. 136; *Ex parte Holman et al.* 28 Iowa, 88; *Vance v. City of Little Rock*, 30 Ark. 452-3; *Brooks v. City of Memphis*, 3 Cent. L. J. 356; *United States v. Silverman*, April term, 1878.

The power of this court to enforce its judgments in this

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class of cases according to the terms of the contract and in the mode authorized by the laws of the state, is not an open question.

It would be an anomaly in the judicial system of any government to invest its courts with jurisdiction to hear causes and render judgments, and yet deny to them the power to execute and enforce their judgments.

Argument upon this question in this and all other courts was long since foreclosed by the unanimous judgment of the supreme court of the United States. *Know County v. Aspinwall*, 24 How. 377.

And the doctrine established in the case last cited — that the circuit courts of the United States have the power, and that it is their duty, to issue this writ, in this class of cases, to the proper officers of counties, cities and towns, to compel the levy of a tax, and to enforce obedience thereto,—has been reaffirmed by that court in a long line of cases coming down to a late date. *Supervisors v. United States*, 4 Wall. 435; *Von Hoffman v. City of Quincy*, id. 535; *City of Galena v. Amy*, 5 Wall. 705; *Riggs v. Johnson County*, 6 Wall. 166; *Weber v. Lee County*, id. 310; *Walkley v. City of Muscatine*, id. 481; *United States v. Keokuk*, id. 514, 518; *Benbow v. Iowa City*, 7 Wall. 313; *Butz v. City of Muscatine*, 8 Wall. 575; *The Mayor v. Lord*, 9 Wall. 409; *Heine v. Levee Commissioners*, 19 Wall. 655; *Board of Liquidation v. McComb*, 2 Otto, 531.

It is apparent that some of the counties in this district, under authority of acts of the legislature, have issued bonds to fund previous indebtedness, to aid in the construction of railroads, and to build court houses and jails, to an amount beyond their present ability to pay without the imposition of a tax too excessive to be borne by any community; and the imposition of which would lead to general delinquency in the payment of taxes.

It would seem to be for the interest of the creditors and counties, alike, in such cases, by negotiation, to reduce the

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volume of indebtedness within a limit the counties are able to pay, and for the counties thereafter to pay the interest without the addition of costs. Especially would this be a just measure in the case of those counties that received little or no consideration for their bonds, by reason of the improvident action on the part of their officers and the fraudulent action of the parties to whom the bonds were originally issued.

But this is a matter which addresses itself to the counties and their creditors, and over which this court has no control, and which cannot be effected through its agency.

The court is powerless, in this class of cases, to relieve against the results of bad laws and the folly of the people in voting, and their officers in issuing, bonds under such laws. In answer to an appeal, similar to appeals that have been made to this court, in this class of cases, the supreme court of the United States said: "The counsel for the plaintiff in error has called our attention, with emphasis and eloquence, to the diminished resources of the city and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them." *City of Galena v. Amy*, 5 Wall. 705.

Popular opinion, for the time being, in particular localities, however unanimous it may be, and from whatever cause arising, cannot, in a court of justice, be allowed to prevail against the constitutional and legal rights of the humblest suitor.

Should this court yield to such influences it would thereby only add additional costs to the already heavy burdens of these counties; for its error would meet with speedy correction in that court whose judgments in exposition of the rights of suitors under the constitution of the United States, are binding on all courts and uniform in their operation on all persons and in all places within the jurisdiction of the United

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States. And this court would not long enjoy the esteem and confidence of the people of these very counties themselves, if it should strike down the constitution and the law, to give them a temporary relief and gain their present applause.

An order will be entered directing the peremptory writ of *mandamus* to issue in the terms of the rule.

JOHN H. BLAIR v. WILLIAM TURTLE and JESSE H. BULL.

(*District of Nebraska. January, 1881.*)

SERVICE OF PROCESS ON PERSON BROUGHT BY FORCE OR INDUCED BY FRAUD TO COME INTO JURISDICTION.—Where a person has been brought from another state by force, or has been induced to come into this state by the fraud and deceit of another for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed on proper plea, where the facts are undisputed.

Hunter & Sawyer, Brown, England & Brown, for plaintiff.

Lamb, Billingsly & Lambertson, for defendants.

DUNDY, *District Judge*.—On the twenty-fifth of October, 1876, the plaintiff, John H. Blair, commenced his action against the defendants, Wm. Turtle and Jesse H. Bull, in the district court of Lancaster county of the second judicial district of the state of Nebraska. Security for costs of suit was given, whereupon a summons was issued and placed in the hands of the sheriff of the said county for service. The return of the sheriff shows that he made personal service of the summons on both of the said defendants. The summons required the defendants to appear and plead to the petition by the twenty-seventh of November following the date thereof.

The petition seems to show, or at least it is therein alleged,

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that in the year 1875 the defendants wrongfully and unlawfully detained and imprisoned the plaintiff in the common jail of Lancaster county; on the railroad cars running on a railroad extending from Lincoln, Nebraska, to Saint Louis, Missouri; at Saint Louis, Missouri; on railroad cars between Saint Louis and New York city; on board an ocean steamer plying between New York city and Liverpool, England, and also in England after the plaintiff had there arrived, for which wrongful and unlawful detention and imprisonment, the plaintiff claims damages in the sum of \$25,000.

Nothing further seems to have been done in the case, at least so far as the pleadings were concerned, until the twentieth of May following, at which time the defendants filed a plea denying the jurisdiction of the court, the appearance being special and for the purpose stated only. On the same day the defendants filed in the state court their petition, affidavit and bond for the removal of the cause to this court, where it is conceded the cause was properly removed, the plaintiff being a citizen of the state of Nebraska and the defendants citizens of the state of Illinois. The plea thus interposed by the defendants may, at least for all practical purposes, be regarded and treated as a motion to quash the service of process and return to the writ. This special plea states, in substance, that at the time the suit was commenced, and when the summons was served upon the defendants, they were resident citizens of the state of Illinois, and did not at that time come voluntarily within the jurisdiction of the said court nor within the state of Nebraska, but that they were brought from the state of Illinois into the state of Nebraska by force, to answer to an indictment for a felonious offense said to have been committed in the last named state. That the indictment was found in said Lancaster county, and that the defendants were brought there by force to answer the same, and were actually in jail in said county in the custody of the sheriff of the county, to answer to the said indictment, when this suit was brought, and service of process was made on

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them. That it was necessary for each of the defendants to be present at the trial of said indictment to testify on behalf of himself and each other. And that the indictment was found and procured, and the defendants were forced from their own state, and were forcibly brought into this state, by the fraud and procurement of this plaintiff, for the purpose of forcing them within the jurisdiction of said court, so that a summons might then be served upon them, which was done accordingly.

On the twenty-sixth of March, 1879, the plaintiff filed in this court a general demurrer to this plea, which was finally submitted for determination.

The sole question presented for determination under this demurrer is, are the facts stated in the plea sufficient to warrant and justify the court in quashing the service of process, as shown by the return of the sheriff of Lancaster county?

Exceptions were taken by plaintiff to the form of the defendant's plea, for the reason, as stated, that such a plea is unknown to the code of practice of this state. Strictly speaking, this may be true, but courts of justice usually look more to substance than to form when the ends of justice will thereby be subserved; and whilst this may be in form a plea in abatement, we may nevertheless treat it as a motion to quash the service of the process, as the plea contains all the necessary elements of such a motion. And it matters but little what name is given to the plea, if the matter it contains be well stated, and the matter thereof be true in point of fact. In this instance there is no room left to doubt the correctness of either. The facts are fully and clearly, and I might add quite artistically, stated in the plea. The truth of the matters stated is beyond dispute, as the demurrer admits the allegations to be true, and we are to take the statement of the defendants, as embodied in their plea, as absolute verity. In mere personal actions, like this one, courts acquire no jurisdiction over the wrongdoers, or the subject matter of the controversy, until personal service of the process can be made on one or more defendants, or until the defendants make vol-

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untary appearance in the cause, either in person or by attorney. Before the district court of Lancaster county, the court in which this suit was brought, could have properly proceeded to judgment, it would have been necessary to find these defendants, or one of them, within the county where service could have been made. And if the defendants had been found within the jurisdiction of the said court, that is, within Lancaster county, and service had then been properly made, under ordinary circumstances, the court thus acquiring jurisdiction would proceed to trial and judgment. What is here stated applies only to those who voluntarily come within the jurisdiction of the court where suit may be instituted, and where personal service is properly had.

But in this case the defendants had been indicted in Lancaster county, in this state, for the crime of kidnapping, and the governor of the state had made his requisition on the governor of Illinois, under the extradition laws, for the surrender of the defendants, who were alleged to be fugitives from justice. The governor of Illinois honored the requisition, the defendants were arrested on his warrant and were afterwards brought back to this state in custody of an officer, and were placed in jail to await trial on the said indictment. The defendants were here by compulsion—they were here because they could not avoid it; they were seized in Illinois on criminal process to answer in said court for the crime said to have been committed in this state, where they were brought and compelled by force to remain for trial. We see, then, that the defendants were forced within the jurisdiction of the court where the suit was brought, to answer to an indictment which had been procured against them mainly by the efforts of the plaintiff, for the purpose of forcing their attendance at court so that the summons issued in this case might be served on them, thus subjecting them to the jurisdiction of the court when it could have been acquired in no other way. Such a proceeding ought not to be sanctioned by any court. No authority has been cited where such proceedings have

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been upheld by any of the courts in this country for many years past. Reason, fair dealing and common honesty all unite in overturning such a practice. And were it otherwise, it is believed that the principle involved is too well settled by many well considered adjudicated cases to be seriously questioned at this late day. See *Lagrare's Case*, 14 Abb. Pr. 336, 344; *Raustead v. Otis*, 52 Ill. 30; *Williams v. Reed*, 29 N. J. Law, 385; *Dugan v. Miller*, 37 N. J. Law, 182; *Juneau Bank v. McSpeelan*, 5 Biss. 64.

The cases here referred to are abundant authority for the disposition to be made of this plea. They sanction this doctrine, and establish the correctness of this proposition, namely:

That where a plaintiff in a suit brings by force a defendant within the jurisdiction of a court, or induces him by deceitful or fraudulent practices to come within the jurisdiction, for the purpose of having him served with process, the courts will interfere by quashing the summons or service thereof to prevent the fraudulent and improper use of the process. This is a proper case for the exercise of such authority. The process of the court has been misused, if it has not been greatly abused. What has been properly and justly done in numerous other cases must be done here. That is, the service of the process in this suit, and the sheriff's return thereto, must be quashed, and it is so ordered.

It was claimed, however, that as the defendants had appeared in the state court, had there filed a petition for the removal of the cause to this court, had actually had the cause docketed here and heard on the plea, that the defendants were estopped from further proceedings on the said plea. It was conceded that the cause was properly removed to this court. When the application for removal was made, the cause stood for hearing on said plea. It stood for hearing on the plea when it was first docketed in this court. Hearing was had thereon at the first possible opportunity afforded the defendants. They have contested, step by step, the supposed right

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of the plaintiff to force them into court in the manner stated. They have waived no privilege and lost no right by thus proceeding. They have the right to dispute and contest the jurisdiction of the court at almost any stage of the proceedings, and unless they have in some way waived or forfeited that right, they must be upheld in its exercise, regardless of consequences to either party. It is not believed that this right has in any manner been impaired by the defendants in their first appearance in the cause nor during any of the subsequent stages of the proceedings.

The plaintiff can, if he sees proper, have the cause continued and an *alias* summons issued. But if there is no probability of finding the defendants within the jurisdiction of this court, no useful purpose can be served by its longer remaining on the docket.

**CHAS. E. LEWIS v. THE BOARD OF COUNTY COMMISSIONERS OF
SHERMAN COUNTY.**

(*District of Nebraska. January, 1881.*)

1. **COUNTY BONDS—COURT HOUSES—INTERNAL IMPROVEMENTS—CONSTRUCTION OF STATUTE.**—Where a statute passed in 1856, and ever since continued in force, authorized the county commissioners to build and keep in repair county buildings, and to borrow money under certain conditions for that purpose, and another statute passed in 1869 provided for issuing county bonds to aid in building railroads and other works of internal improvement, *held*, that although court houses are works of internal improvement, yet, inasmuch as their erection had been provided for by the first named act, they were not embraced within the general terms of the latter.
2. **POWER TO BORROW MONEY TO BUILD COURT HOUSE—COUNTY BONDS.** Where a statute authorizes a county to borrow money to build a court house, the county is not thereby authorized to issue bonds for that purpose, and to put them on the market, without borrowing or realizing money on the same.
3. **COUNTY BRIDGE BONDS—RECITALS—INNOCENT HOLDERS.**—The statute of Nebraska authorizes the issue of bonds to aid in building

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bridges, and where such bonds are issued, and contain recitals that they are issued for that purpose conformably to law, they are good in the hands of innocent purchasers.

Findings of the court, jury trial having been waived in writing.

It is found from the pleadings and the testimony produced in support thereof:

First. That the bonds described in the plaintiff's petition as court house bonds, from which a part of the coupons in suit were detached, are invalid, for the reason that no vote of the people ever authorized their issue, and for the further reason that the county never realized anything thereon, and no part of any proceeds of the same was ever used for or applied to the erection of a court house, and that there is no recital in the bonds, so called, showing that the bonds were properly issued so as to estop the defendant from insisting on their invalidity.

Second. That the bonds described in the plaintiff's petition as bridge bonds, from which the other coupons in suit were detached, were issued without having been authorized by a vote of the people. But the bridges were built in the county, by direction of the county, for the county, and were paid for by the bonds, or from proceeds thereof, and the recitals in the bonds, showing that they were issued conformably to law, estops the defendant from setting up the defense relied on, as the plaintiff was an innocent purchaser for value, etc. That the bridge bonds were issued and put in circulation, and were found for sale in open market by the plaintiff.

Mr. Ennis, for plaintiff.

Mr. Marquett, for defendant.

DUNDY, *District Judge*.—This suit is based on a large number of coupons, long over due, detached from two series of bonds, issued by Sherman county, or at least by officers representing the county. One of such series of bonds was issued for the purpose of building a court house, and the other series for

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the purpose of building bridges in the county. The defense to the bonds is that they were never voted for by the people of the county; that they were never issued by the county; and that neither the court house bonds, nor the proceeds thereof, were ever applied in any manner to the erection of a court house.

It is made to appear from the minutes of the county commissioners, that the court house bonds were issued and placed in the hands of a banker at Kearney, probably for the purpose of being negotiated. But some time thereafter, the bonds were recalled by the county board, for what particular purpose does not appear. At what time, or in what manner, or for what particular purpose, these bonds were afterwards turned loose on the market, is not shown. Nor does it make any particular difference in that regard.

It may be conceded, as a general proposition, that a "court house" is a work of internal improvement. But it may very well be questioned whether our internal improvement law of the fifteenth of February, 1869, has any application to such a work of internal improvement. As early as the year 1856, the territorial legislature provided for the building of court houses and jails, and made ample provision therefor. The same law has been in force almost ever since, and with few slight changes is the law to-day. When the internal improvement law of 1869 was passed, it was well enough understood that it was passed for the express purpose of enabling counties, cities and towns to vote aid to railroads, and bridges, and works of a kindred character. No one supposed it to be necessary to pass such a law to enable a county to build a court house. Ample provision had already been made by law therefor. On the twenty-seventh of February, 1873, before these bonds were issued, the legislature re-enacted the old law, with slight changes, which authorized the building of court houses, and it is believed to be the only general law which authorized the expenditure of money for any such purpose. This law indicates pretty clearly the mode of proceeding when it is nec-

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essary or desirable to build a court house. Section 14, page 234, of the "General Statutes of Nebraska" has this provision:

"The board of county commissioners, at any meeting, shall have power: * * * III. To purchase sites for and to build and keep in repair county buildings. * * * IV. Apportion and order the levying of taxes as provided by law, and to borrow upon the credit of the county a sum sufficient for the erection of county buildings."

"Sec. 15. The board of county commissioners shall not * * * borrow money for the purpose specified in the fourth division of the preceding section without first having submitted the question * * * of borrowing money as aforesaid to a vote of the electors of the county."

Other provisions of the law perfect the details of the business to be transacted by the commissioners in connection with the voting and borrowing of money.

It will be seen from the foregoing, that before the commissioners can lawfully borrow money for the purpose of building a court house the right, and authority to do so, must be conferred by a vote of the electors of the county.

This is indispensable, as no right, for such purpose, exists without it. It must be observed that the authority here conferred on the county commissioners is to borrow money to build a court house. The law does not authorize the people to vote bonds to erect the building. They may, by their votes, lawfully empower the commissioners to borrow money for the purpose in question, but they cannot authorize the commissioners to issue bonds for such a purpose and have them hawked around the county and sold to A, B and C, to raise money at a ruinous discount, for any such purpose. It is one thing to authorize the borrowing of money to build a court house, when needed, but it is another and very different thing to vote for the issuing of bonds therefor, when the law does not authorize it. It is true, if the people, by a proper vote, should authorize the commissioners to borrow money, that on receiv-

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ing the money a bond or other evidence of indebtedness might be given for the payment of the money when due under the terms of the loan. This would perhaps follow as an incident to the right to borrow. But even then, the amount of money so borrowed should equal the amount for which the bond was given. Otherwise there would be no end to the fraudulent practices of both officers and purchasers of bonds. Such a practice cannot be encouraged, and it is the duty of courts to close the doors against it. If, then, the law does not authorize the voting of bonds for any such a purpose as building a court house, then the authority to borrow money cannot be enlarged by the commissioners or the people so as to include the right to issue bonds and sell them at such prices as can be procured therefor, when such authority has been withheld by the law-making power. This view is fully supported by a case recently decided by the supreme court. *Scipio v. Wright*, 11 Otto, 665.

So far as the court house bonds are concerned, then, they must be held invalid. For the reasons:

First. Want of authority for voting bonds for the purpose of building a court house.

Second. Because no bonds were ever voted by Sherman county for any such purpose.

Third. Because none of the bonds or the proceeds thereof were ever used to build a court house, or were ever used for any other purpose by the county; and,

Fourth. Because the bonds contained no recitals, showing that the same had been issued conformably to law, so as to cut off the defenses relied on.

But with reference to the coupons taken from the bridge bonds, it is different. There is full authority of law for the people of a county to vote for the issuing of bonds to aid in building bridges. The bridge bonds recite on their face that their issue was duly authorized by a vote of the people of the county, and that the result of such election was entered upon the commissioners' records, as provided by law. This recital

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is perhaps untrue, as the commissioners' proceedings show no such thing. But as stated, the law authorizes the voting of bonds for such a purpose, and the bond recites the fact that they were properly voted for and authorized by a vote of the people of the county on the eleventh day of August, 1873, and that the result of the vote was spread upon the commissioners' journal of proceedings. The purchaser of the bonds, without notice of infirmity, was not in a position to know, or believe, that the bonds recited a falsehood on their face, and he was not, under the circumstances, bound to look beyond the bond itself. He might well believe what he saw stated in the bond. Fair dealing will not permit the defendant to gainsay what it has, through its proper officers, thus solemnly asserted. But this is not all. The law not only authorizes the issuing of bonds for such purposes, but they were so issued, and used direct in payment for building several bridges in the county, the principal one being across the Loup river. The county has had the full benefit of the bridge bonds. They were turned over directly to the parties who built the bridges, and were by them put on the market and into circulation, with the statement on their face that they had been properly voted for and issued. Good faith and common honesty require their payment, when found in the hands of innocent, *bona fide* purchasers. The plaintiff must, therefore, have judgment on the coupons detached from the bridge bonds, with lawful interest thereon from the time the same became due and payable.

Nickerson v. Atchison, Topeka & Santa Fe Railroad Co.

THOS. A. NICKERSON *et al.* v. THE ATCHISON, TOPEKA & SANTA
FE RAILROAD COMPANY *et al.*

(District of Kansas. June, 1880.)

1. EQUITY—STIPULATION TO SUBMIT CAUSE UPON AGREED STATEMENT OF FACTS WITHOUT PLEADING.—This court will not take cognizance of a case in equity in which parties agree upon a statement of facts and stipulate that the court shall take jurisdiction, try the cause and render decree without pleadings.
2. STATUTE OF STATE NO APPLICATION TO A FEDERAL COURT OF EQUITY. The statute of Kansas authorizing such a proceeding in the courts of that state, confers no jurisdiction upon this court sitting as a federal court of equity, nor does it change the chancery practice in this court in any respect.

In equity.

Ross Burns and *A. A. Hunt*, for plaintiff.

Geo. R. Peck, for defendant.

McCABY, *Circuit Judge*.—A stipulation has been filed, signed by the parties to this controversy, setting forth an agreed statement of facts, and consenting that the court may take jurisdiction, hear, try and determine the case, and render decree without pleadings.

Section 913 of the Revised Statutes of the United States provides that "the forms and modes of proceeding in suits of equity, * * * in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity, * * * except when otherwise provided by statute or by rules of court, made in pursuance thereof." It is well settled that this statute adopts the equity practice as it existed in England at the time of the passage of the judiciary act. I am not aware of anything in that practice that would authorize the institution of a proceeding in equity, by the filing in court of such a stipulation as that now before

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me. I take it to be well settled, that the practice in a court of equity is regulated by law or rule and cannot be varied by the agreement of the parties. This court cannot be constituted a board of arbitration, in the absence of a law of the United States to authorize such a proceeding.

We are referred to a statute of Kansas which seems to authorize such a proceeding in the courts of that state (Comp. Kansas Statutes, ch. 80); but it is clear that the jurisdiction and practice of this court as a court of equity is not affected by that statute. *Boyle v. Zachary*, 6 Pet. 658; *United States v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Noonan v. Lee*, 2 Black, 507; *Robinson v. Campbell*, 3 Wheat. 323.

The application is overruled.

FOSTER, *District Judge*, concurs.

SARAH A. BALDWIN v. BENJAMIN S. ROSIER *et al.*

(*District of Iowa. May, 1890.*)

PLEA OF MINORITY A PERSONAL DEFENSE.—In a suit to foreclose a mortgage given to secure a promissory note, the maker of the note may set up by way of defense the fact that he was a minor when he executed the same, but a subsequent lien holder cannot join in this defense. Only the minor himself can plead it.

In equity.

Brown & Dudley, for plaintiff.

J. W. Rogers & Son, for defendant.

McCREARY, *Circuit Judge (orally)*.—This is a bill to foreclose a mortgage executed by the defendant Rosier, to the plaintiff, to secure a promissory note. The defendant Rosier seeks to avoid the contract sued on, by pleading his

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infancy at the time of its execution. The defendant Davis holds a subsequent lien on the premises mortgaged, and he joins with Rosier in his answer, and pleads the infancy of his co-defendant Rosier as a defense. To this answer, so far as Davis is concerned, the complainant excepts.

The contract of an infant is not necessarily void, but only voidable, since the infant has an election to avoid it during his minority, and affirm it after reaching his majority.

The privilege of avoiding his acts or contracts, when they are voidable only, and not absolutely void, is personal to the infant, and one which no one can exercise for him except his heirs or legal representatives. A person, not a party to the contract, cannot take advantage of the infancy of the parties to it. It is a personal privilege. Schouler on Domestic Relations, 2d ed. 534, 535.

I am of the opinion that the defendant Davis cannot set up as a defense the infancy of the defendant Rosier. The exceptions to his answer are therefore sustained.

THE UNITED STATES v. JOHN ROCHE.

(*District of Colorado.* December, 1879.)

1. **TRADE MARK DECISION OF SUPREME COURT—EFFECT OF.**—The decision of the supreme court of the United States holding the trade mark legislation of congress to be unconstitutional and void, does not affect the validity or impair the force of a decree enjoining the use by defendant of a certain label or trade mark, it appearing that the injunction suit wherein said decree was rendered was not a statutory but a common law proceeding.
2. **COMMON LAW REMEDY FOR VIOLATION OF TRADE MARK.**—The right of the proprietor of a trade mark to the exclusive use of the same, and to protect and enforce his exclusive right by proceedings in chancery, exists by virtue of the common law, and independently of the statute.
3. **WHAT AMOUNTS TO INFRINGEMENT OF TRADE MARK.**—The defendant had no right to imitate the trade mark of the plaintiff in the injunction, by using in his label or trade mark any of the prominent or distinguishing words of said plaintiff's trade mark.

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MCCRARY, *Circuit Judge*.— By decree of this court entered at the June term, 1879, the defendant was, at the suit of the Philip Best Brewing Company and others, perpetually restrained from thereafter using a certain trade mark or label upon bottles of manufactured beer.

By an order of this court at chambers, made on the twenty-ninth day of September last, it was, after proper showing, ordered that the defendant show cause why he should not be attached or otherwise proceeded against for contempt of the decree aforesaid.

In answer to this rule, it is suggested that the supreme court of the United States having in the recent cases of *United States v. Stiffens*, and *Same v. Johnson*, 100 U. S. 82, held the existing congressional legislation on the subject of trade marks to be unconstitutional and void, the decree of injunction above mentioned is a nullity and the defendant is not bound to obey it.

Upon looking into the record we find that the injunction suit was not a proceeding instituted under the statute, but a bill in chancery brought to protect and enforce the plaintiff's exclusive right of property in their trade mark as that right exists at common law. In the opinion of the supreme court above referred to it is said: "The right to adopt and use a symbol or device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has been long recognized by the common law and chancery courts of England and of this country, and by the statutes of some of the states. It is a property right for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity with compensation for past infringement. This property, and the exclusive right to its use, were not created by the act of congress and do not now depend upon that act for their enforcement. The whole system of trade mark property and the civil remedies for its protection existed long anterior to the act of congress and remain in full force since

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its passage." It follows beyond all doubt that the validity of the decree heretofore rendered against the defendant is in no wise affected by the decision of the supreme court holding the trade mark legislation of congress to be unconstitutional.

It is, however, further insisted that the label or trade mark now being employed by defendant is not so nearly like that of the plaintiffs in the injunction as to deceive a person of ordinary caution. This point, even if sound, comes too late. By reference to the decree, which was entered by consent, it will be seen that the defendant was, among other things, enjoined from using any label whatsoever bearing thereon the words "Best Brewing Company." These words are placed conspicuously upon the label which the defendant by his own admission has been, since the injunction, and is now, placing upon bottles of beer manufactured and sold or offered for sale by him. He has therefore violated the plain terms of the injunction.

If, however, the question was still an open one, we should hold, without hesitation, that the defendant is rightfully enjoined from using a label bearing the words "The Best Brewing Co." or "The Best Brewing Co.'s Export Beer." These are the prominent and distinguishing words upon the label or trade mark now in use by the defendant as they are likewise upon the trade mark or label of the plaintiff in the injunction. The defendant has no right to imitate the trade mark of the plaintiff in the injunction by copying therefrom any of these prominent or distinguishing words. The use by the defendant of a label bearing these words is, in our judgment, well calculated to deceive even the cautious and careful purchaser, by leading him to infer that it is the trade mark of plaintiff in the injunction.

The showing of cause by the defendant is held to be insufficient, and it is accordingly ordered that an attachment issue against him returnable the first day of the next term of this court, and that upon service of the same the defendant enter into bond in the sum of one thousand dollars, with surety to

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be approved by the clerk, conditioned that he will appear on the first day of the next term of this court and abide such further order as the court may then make, and that in the meantime he will obey the decree of injunction aforesaid.

THE CONNECTICUT MUTUAL LIFE INSURANCE CO. v. ISAAC E. JONES.

(*Eastern District of Missouri.* September, 1879.)

1. **MERGER OF NOTE IN JUDGMENT.**—Plaintiff held a note against defendant, secured by a deed of trust upon real estate in Saint Louis. Judgment was recovered on the note in a suit at law thereon. Afterwards, the judgment being unpaid, there was a sale of the realty under the deed of trust. *Held*, that in an action of ejectment to recover possession under such sale it was not necessary to offer the note in evidence. The note was merged in the judgment and the latter became the evidence of the debt.
2. **SUIT ON NOTE NO WAIVER OF MORTGAGE LIEN.**—The plaintiff waived none of his rights under the deed of trust by suing at law on the note.
3. **WIFE OF OWNER OF HOMESTEAD NOT A NECESSARY PARTY IN EJECTMENT THEREFOR.**—The wife of the defendant was not a necessary party to the suit. Under the law of Missouri the wife has no present right of possession of the homestead independently of the husband, and as against her own deed. The homestead may be disposed of by the joint deed of husband and wife in the same manner as other real property of the husband.
4. **SALE UNDER DEED OF TRUST PENDING RETURN OF EXECUTION.**—The sale under the deed of trust was not void because the general execution issued upon the judgment at law was still in the marshal's hands.

Overall & Judson, for plaintiff.

Thos. S. Espy, for defendant.

MCCRARY, Circuit Judge.—On the seventh day of November, 1867, the defendant borrowed from plaintiff \$6,000, for which he executed his promissory note, to secure which he and

his wife joined in the execution of a deed of trust by which they conveyed the real estate in question (a lot in the city of St. Louis), to one Albert Todd, as trustee.

On the nineteenth day of April, 1879, the plaintiff recovered in this court a judgment at law upon said promissory note for \$6,226, upon which execution was issued, and a small sum, collected by levy upon and sale of personal property, was duly credited upon the judgment. The property covered by the deed of trust is the homestead of the defendant. The deed of trust contained a provision in the usual form authorizing the trustee upon default in payment of the note to proceed to sell the property, after notice, to the highest bidder for cash. The judgment rendered upon the note being unsatisfied (except as to the small sum made upon general execution), the plaintiff procured the trustee to sell under the deed of trust, after due notice. The sale took place on the first day of July, 1879, and the plaintiff was the purchaser for the sum of \$6,000. A deed from the trustee to the plaintiff was duly executed, and to obtain possession under this purchase the present suit was brought. Upon trial before a jury there was verdict and judgment for the plaintiff.

Defendant moves to set aside the verdict and for new trial, upon grounds which will now be stated and considered.

1. It is insisted that the *note* should have been produced and offered in evidence in connection with the deed of trust. We are of the opinion, however, that the production of the note was not necessary. It had been merged in the judgment, and the latter had become the evidence of the debt secured by the deed of trust. It is well settled that where judgment is rendered upon a note it ceases to be, and the judgment becomes the evidence, and the only evidence of the debt. *Wyman v. Cochrane*, 35 Ill. 154; *Oher v. Gallagher*, 3 Otto, 206; *Hagg v. Charlton*, 26 Pa. St. 202; Freeman on Judgments, 180, 181.

It does not, however, follow as contended by defendant's counsel, that the plaintiff lost or waived any rights under the

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deed of trust by attempting to collect the debt due from defendant by means of a judgment at law and a general execution.

A deed of trust under the laws of Missouri is simply a mortgage with power of sale, and it is very clear that a change in the form of the debt from that of a promissory note into a judgment, did not in anywise affect the rights or obligations of the parties under the deed of trust. The debt remained unsatisfied, and the deed of trust given to secure it continued in full force. Jones on Mortgages, secs. 1215, 1220, 1221; *Lichty v. McMartin*, 11 Kan. 565; *Van Sant v. Allmon*, 23 Ill. 30; *Dunkley v. Van Buren*, 3 Johns. Ch. 330.

2. It is also insisted that the court erred in refusing the application of the wife of defendant to become a party to this suit, and to be heard as such. It is very earnestly contended by counsel, that inasmuch as the property in question was the homestead of defendant and his family, that therefore the wife of the defendant has, under the homestead law of this state, a present right of possession in her own right, independently of her husband, and that she is, therefore, a necessary party to the present action of ejectment.

The law of Missouri relating to homestead exemptions contains no provision limiting in any way the power of the husband and wife to alienate their homestead by deed of conveyance, either with or without conditions. The power of the owner of a homestead to convey or mortgage the same is not restricted, except by the regulations applicable to conveyances of real estate in general. The statute is not framed with a view to interfere with the right of the owner of homestead property to dispose of it by deed, but to protect it from sale under execution during the lifetime of the owner, and to secure it to his widow and children as a home after his death. Such property, within a certain valuation, is exempt from sale under execution, and upon the death of the owner is vested by law in the surviving members of his family. But there is

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nothing in the statute, and certainly nothing outside of the statute, to support the proposition that the wife of the owner, during his lifetime, has any right of possession or claim of any kind in the homestead that may not be divested by a conveyance in which she joins. Nor is there any force in the suggestion of counsel, that the wife in this case released her dower interest only, and not her homestead right; she joined in the deed and must be held to have conveyed all her interest. Where the legal title to a lot occupied as a homestead is in the husband, he and his wife, by joining in an absolute conveyance thereof, may undoubtedly make the purchaser a good title, and their right to make a conditional sale, to execute a mortgage or deed of trust, is equally clear, unless the same is prohibited by statute. *In re Cox*, 2 Dillon, 320; *Babcock v. Hoey*, 11 Iowa, 375; *Pfeiffer v. Rhein*, 16 Cal. 643.

It is conceded that in general the wife is not a proper party to an action of ejectment for property in the possession of the husband, and in which she holds no separate estate in her own name. The possession of the husband is the possession of the wife. *Bledsoe v. Simms*, 53 Mo. 305.

But it is insisted that because the property here is a homestead a different rule should prevail. We have already seen that, as against her own deed, the wife can have no separate present right of possession, and we are therefore constrained to hold that the general rule is applicable to this case, and that she is not a proper party.

3. It is said that the sale under the deed of trust was void, because the general execution was still in the hands of the marshal, and the defendant had, until the fifteenth of September, the return day of the writ, in which to satisfy the same by payment.

It is true that the execution remained in force, and was not necessarily returned prior to that date; but it is not true that the defendant had the right to postpone the sale under the deed of trust until the expiration of that period. He could deprive plaintiff of its rights under the deed of trust only by

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payment of the debt. The plaintiff's remedies were concurrent, and it had the right to pursue both or either, provided one satisfaction only was received. Jones on Mortgages, sec. 1215 *et seq.*; *Gilman v. Telegraph Co.* 91 U. S. 603.

The motion is overruled.

THOMAS, Trustee, v. THE BROWNSVILLE, FORT KEARNEY & PACIFIC RAILWAY Co. and others.

(*District of Nebraska. May, 1880.*)

1. CONTRACT — PARTIES — RAILROAD — DIRECTORS.— A contract between a railroad and a construction company is void where any of the directors of the railroad are members of the construction company.
2. SAME — ESTOPPEL — RATIFICATION.— The stockholders of the railroad are not estopped by long acquiescence in such contract, nor can the same be ratified by a board of directors composed in part of members of the construction company.
3. SAME — EQUITABLE RELIEF — PUBLIC POLICY.— Public policy will not permit a court to grant equitable relief under such contract, where it further appeared, upon the face of the contract, that each director of the railroad received a pecuniary consideration for entering into the contract.

In equity. Mortgage foreclosure.

J. N. Woolworth and *J. R. Webster*, for complainant.

J. H. Broady, for respondents.

McCABY, Circuit Judge.—The defendant railway company is a corporation organized under the laws of Nebraska, and had authority to construct a railroad from Brownsville westward to the west line of Gage county, Nebraska. It possessed certain property and assets which, on the eighteenth day of September, 1871, according to the report of the master herein, amounted to \$117,042.56. Said company having commenced the construction of said railroad, and being

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unable to complete it without securing capital from other parties, on the said eighteenth day of September, 1871, entered into a contract with Benjamin E. Smith and William Dennison, of Ohio, and J. N. Converse, of Indiana, and such others as might thereafter be associated with them, whereby the latter, for certain considerations named, agreed to complete the construction of the road over and along the route above named.

The mortgage sued on in this case was executed to Joseph T. Thomas, trustee, to secure the payment of certain bonds issued under the said construction contract for the purpose of building the road. The validity of this contract is assailed upon the ground that subsequently to its execution, and before any work was done under it, two of the stockholders and directors of the defendant corporation became interested with Smith, Dennison and Converse as parties thereto, so that two of the five contractors were parties to the contract on both sides. The construction company thus organized went on under the contract for several years, expending large sums of money in the construction of the road, and now claims a large balance as due to it on said contract, for which it holds bonds secured by the mortgage sued on. It seeks to recover judgment and a foreclosure of said mortgage. The validity of the mortgage, and of the bonds to secure which it was given, depends upon the validity of the construction contract, which is the foundation upon which alone they must be supported.

Upon consideration of the proofs in the case, the master's report, and the law, I have reached the following conclusions:

1. That the admission into the construction company, under the construction contract, of two officers of the railroad company, was unlawful and vitiated the contract. It matters not whether the contract was entered into with the understanding that the two railroad directors were to be admitted or not, their presence as parties on both sides during the progress of the work, and when payments and settlements were to be made under the contract, is enough. *Wardell v. R. Co.* 4 Dillon, 33; *R. Co. v. Poor*, 59 Me. 270.

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2. It is insisted that there has been such acquiescence on the part of the stockholders of the defendant company, in the matters of which they now complain, that they are estopped. It appears that the contract was openly made and reported to the board of directors of the railroad company, and by them approved, without any apparent effort at secrecy, and that the work of constructing the road was carried on by the construction company under the contract for a period of several years. It is inferred, and perhaps not without reason, from these facts, that the stockholders generally were advised of the particulars of the contract, including the fact that two members of the board of directors were interested in it. It does not, however, follow in my opinion that the contract should be upheld and enforced in a court of equity as against the stockholders.

A ratification, to have this effect, must be made by a board composed of *disinterested* directors. It is not enough that such a contract has been ratified by a board composed in part of the interested directors. The least that can be required in such a case is that the directors concerned in the contract shall resign, and allow their places to be filled by persons who can, without bias, represent the interests of the corporation, and particularly of the individual stockholders.

In the case of *R. Co. v. Dewey*, 14 Mich. 477, the supreme court of that state had occasion to comment upon a contract made with a corporation by a company in which two of the directors were interested, and in the course of the opinion grave doubts were expressed by the court as to whether a ratification by the board, even with full knowledge of all the facts, could render the contract valid while the two interested directors remained influential members of the board, especially if they took part in such ratification.

The court was evidently strongly inclined to the opinion that such a ratification, even if made upon a full disclosure, would amount to nothing. The vice of the original contract

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would, in such a case, enter into the act of ratification — the latter, like the former, being a transaction in part by directors with themselves. Besides, where shall we draw the line? If the presence of two interested directors in the board at the time of ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and if so, what number?

3. It remains to be determined whether the plaintiff can have relief to the extent that the railroad company has been benefited by the contract. This depends upon the question whether the contract was tainted with vice or immorality. *Creath v. Sims*, 5 How. 204. If it were possible to do so, consistently with well-settled principles of great public importance, I should be inclined to grant this relief, since, as between the parties, it is equitable that the corporation should account for whatever of value it has received from the construction company. But if there is in the contract the element of moral turpitude which the law denounces so strongly, I am bound to hold that the parties must be left, without relief from the courts, where they have placed themselves.

The fact that two of the directors of the corporation were admitted to an interest in the contract, bad as that is in itself, is not all, nor the worst part of the transaction. On the same day that the construction contract was executed, and as a part of the transaction, the members of the construction company executed the following agreement with the members of the board of directors and certain other stockholders:

“In consideration of the execution and delivery of a certain contract to construct the Brownsville, Fort Kearney & Pacific Railroad of Nebraska, wherein said railroad company agrees to turn over to us and our associates all of the property owned, and assets, subscriptions, etc., of said company, we therefore do promise and agree and bind ourselves to relieve the following named subscribers to the capital stock of said company from the payment of any further amounts or assessments upon the stock which they may have subscribed thereto,

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by our paying out said stock, and receiving same assigned by them to us, viz.: Henry M. Atkinson, John L. Carson, R. W. Furnas, F. A. Tisdell, James L. McGee, C. F. Stewart, A. J. Ritter, H. C. Lett, T. W. Bedford, T. W. Tipton, John McPherson, and \$500 on the stock of Evan Worthing, in all not to exceed \$16,500 of the \$41,000 of individual subscriptions to said company.

"Witness our hands, this eighteenth day of September, 1871, at the city of Columbus, state of Ohio.

"Witness: G. MOODIE.

[U. S. Int. Rev. Stamp, 5c.]

B. E. SMITH,

"W. DENNISON,

"J. N. CONVERSE."

The list of stockholders in this agreement includes all the directors and five others. I am unable to construe this contract as anything else than a promise to pay each member of the board individually a consideration for his action as a director, in voting for and executing the construction contract. The members of the board were stockholders, and as such liable to assessments. The construction company, "in consideration of the execution and delivery of" the construction contract, undertook to relieve the directors "from the payment of any further amounts or assessments upon the stock which they may have subscribed," etc.

The construction company agreed to "pay out" the stock of each director. The transaction then was as follows: The directors executed a contract, by which they transferred to the construction company, substantially all the property of the corporation, and employed them to construct the road. In order to secure this contract, the construction company took two of the directors into their firm, giving them an interest in the contract, and agreed to pay each of the other directors a pecuniary consideration for making the contract. There was, therefore, not a single member of the board who was not personally interested in favor of making the contract and in hostility to the interests of the stockholders for whom they were trustees, and whose rights they were bound to protect.

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It may be that this agreement was not much considered at the time; that the directors and others interested were anxious to induce the construction company to take hold of the enterprise upon any terms, the company being unable to go on with the work. All this is doubtless true, but it does not change the character of the written contract with which we have now to deal.

I am of the opinion that the contract is so clearly illegal, against public policy, and vicious, that a court of equity cannot enforce it or grant any relief upon it. The bill must, therefore, be dismissed. *Marshall v. R. Co.* 16 How. 314; *Bank of the United States v. Owens*, 2 Pet. 539; 2 Redfield on Railways, 576, 584; Pomeroy on Contracts and Specific Performances, §§ 284, 285, 286; *Wight v. Rindskoff*, 43 Wis. 344; *McWilliams v. Phillips*, 57 Miss. 196; *Guernsey v. Cook*, 120 Mass. 501; *Letter v. Alvey*, 15 Kan. 157.

THE UNITED STATES v. THE RUM RIVER AND MISSISSIPPI BOOM COMPANY *et al.*

(District of Minnesota. September, 1879.)

1. PUBLIC STRUCTURES—PROTECTION OF NAVIGATION.—The federal court will protect and secure by injunction the safety of such public structures as are made to improve the navigation of rivers and to facilitate commerce.
2. CONTROL OF NAVIGABLE RIVERS FOR PURPOSE OF IMPROVEMENT.—Improvement of the navigable rivers, when undertaken by the general government, is exclusively under its control; and when the execution of the work is entrusted to the war department, the engineer in charge, subject to the approval of the secretary of war, prosecutes the work in such manner as in his judgment he deems best.
3. TEMPORARY SUSPENSION OF NAVIGATION MAY BE ORDERED.—Temporary suspension of navigation, when rendered necessary by the mode of improving rivers, is justifiable and lawful.
4. BOOM COMPANY ORGANIZED UNDER STATE LAW HAS NO RIGHT TO INTERFERE.—A boom company authorized by its charter granted by the state legislature to collect and assort logs and turn them out of its boom

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at the request of their owners, and a committee, has by such charter no rights superior to congress when exercising a power conferred by the constitution, and must refrain from performing any act which endangers the successful prosecution of such work.

William W. Billson, United States District Attorney, for complainant.

William Lochren and *James Smith, Jr.*, for respondents.

A bill in equity is filed by the government against the defendant boom company, a corporation created and existing under the laws of the state of Minnesota, and authorized by the terms of its charter to take into its custody all logs driven or coming down the Mississippi river to a point on said river some twenty miles above the falls of St. Anthony, and certain owners of logs in said company's boom and said river, alleging, among other things, that the defendants are turning loose and running over the falls, and threaten to turn loose and run over the falls, large quantities of logs, to the great injury and damage of the improvements constructed by the government under the act of congress entitled "An act making appropriations for the repair, preservation and completion of certain public works on rivers and harbors, and for other purposes," approved March 3, 1875, and other similar subsequent acts; and also to the damage of the public improvements in process of construction under the act of congress entitled "An act making appropriations for the construction, repair, preservation and completion of certain works on rivers and harbors, and for other purposes," approved March 3, 1879, wherein and whereby the sum of \$10,000 was appropriated for the construction of a sluiceway through said public works at St. Anthony Falls, with a view of the improvement of the navigation of said river at said falls. The bill prays for an injunction restraining the defendants.

The defendant boom company appears and answers.

The answer admits most of the material allegations of the

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bill, but claims that said defendant under its charter is authorized and required, and has the legal right to do the acts complained of, and that great and irreparable injury would result to the log owners by its omission to do so, which would render the company liable to suits for damages, etc.

NELSON, *District Judge*.—The general government since 1875 has been prosecuting the improvement of the navigation of the Mississippi river at the falls of St. Anthony, under appropriations yearly made by congress, and previous to the last one on March 3, 1879, had, through the skill of the officer in charge of the work, successfully put a stop to the gradual undermining of the stratum of rock which threatened the destruction of the falls, and would have seriously impaired, above and below, the navigation of the river.

An apron of planked timber was built over the crest of the falls to protect the rock and prevent the washing away of the underlying soft sandstone, and a sluiceway is now being constructed under the act of congress appropriating money for that purpose, through which logs can pass down into the river below without running over the falls and the apron constructed for its protection.

The defendant boom company by its charter takes possession and control of all logs coming down the Mississippi river about twenty miles above the falls, collects and assorts them, and on request of the owners, and direction of a committee, turns them out of its boom into the ponds in the city of Minneapolis or over the falls.

The United States files a bill in equity alleging and charging that the boom company and other defendants, by their action in turning loose logs to run over the falls, are irreparably injuring the improvements already completed by the government, and obstructing those in process of construction.

It is admitted by the answer that the passage of logs over the falls has injured and damaged the improvements at the crest of the falls, and if permitted before the sluice is

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completed, will do further damage and injury; but it is denied that the sluiceway is being injured.

The affidavits of the assistants of the engineer in charge, accompanying the bill, sustain the allegations of injury and probable irreparable damage to all the government works at the falls unless an injunction issue.

The only question necessary to determine on this motion for an injunction, is whether the government can ask the aid of the court to protect and secure the safety of such public structures as are made to improve the navigation of rivers and to facilitate commerce.

It is very clear that the system of improvement of the navigable rivers when undertaken by the general government is exclusively under its control; and it is also certain that when an appropriation is made by congress for any such improvement, and the execution of the work is entrusted to the war department, the engineering officer designated by the department, subject to the approval of the secretary of war, prosecutes the work in such manner as in his judgment he deems best. These propositions have been established by frequent and repeated decisions of the supreme court. (See *Wisconsin v. Duluth*, 96 U. S. Rep. 379; *South Carolina v. Georgia et al.* 93 U. S. Rep. 4.)

While they are not seriously questioned, it is urged that congress did not intend that the public right of navigation on this river should be suspended or impeded during any part of the time when its appropriations were being expended for the improvement of navigation.

That congress has the right to determine what shall be deemed an obstruction to navigation is not doubtful. (See *Wheeling bridge case*.) But it is contended that no act of congress has authorized any improvement which would create even a temporary obstruction to navigation of the river at the falls.

The acts of congress under which these improvements were made, contemplated the protection of the falls of St. Anthony

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as necessary to secure the future navigation of the river and facilitate commerce, and, in appropriating money for that purpose, left the mode of improvement to the discretion of the secretary of war without qualification. The act under which this improvement is made is entitled, "An act making appropriations for the construction, repair, preservation and completion of certain works on rivers and harbors," etc., and any mode can be adopted by the secretary of war which tends to improve the navigation of the river at this locality.

In my opinion this act confers sufficient authority to cause a temporary suspension of the passage of logs held by the company in its booms, if necessary for the safety of the improvement constructed or in process of construction.

Such temporary suspension of navigation is not in judgment of law an *obstruction* to the free navigation of the river, but a necessary step required for the *improvement* of navigation, and although it may be in one sense an obstruction, yet when rendered necessary by the mode of improving the navigation, it is justifiable and lawful. (93 U. S. Rep. 111.)

If I am correct in this determination, then although the judicial department of the government may not forbid the work, or prescribe the manner in which it shall be conducted, it can exercise its power to prevent injury and damage to the improvement, or its destruction, by enjoining such persons having the control of logs in booms or ponds from letting them loose.

A practical view of the situation must be taken. The object sought is the protection of the extensive structures made by the government, and those in process of construction. A vast expenditure of money has been made for the benefit of the public in the interests of commerce, and the results of this outlay are endangered by acts under the control of the defendants. It cannot be doubtful on such a showing that the government is entitled to the aid asked in the bill.

The defendant boom company has by its charter no right superior to congress when exercising a power conferred by

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the constitution. The government having assumed the improvement of navigation at the falls, and under the authority of congress, through the war department expending the money appropriated for such improvement, the defendant company must refrain from performing any act authorized by its charter which endangers the successful prosecution of the work. Let an injunction issue.

SHERMAN H. KNEVALS v. JUDSON R. HYDE.

(*District of Nebraska.*)

1. ACT OF CONGRESS, JULY 23, 1866 — LAND GRANT. — Under the act of congress of July 23, 1866, granting lands to the state of Kansas for the benefit of the St. Joseph & Denver City Railroad Company, the filing in the office of the secretary of the interior of the map of the location of the road, was the location required, and from the date of such filing the line or route of the road is to be regarded as "definitely fixed."
2. VESTED RIGHT UNDER LAND GRANT. — From the date of such location the equitable title was vested in the railroad company, and a patent thereafter issued to defendant's grantor conveyed no title.
3. NOTICE. — No other notice was required of the company than the filing of its map with the secretary of the interior.
4. FORFEITURE. — With the question of forfeiture by reason of failure to complete the road, neither the defendant nor his grantor has anything to do. The right to declare such a forfeiture belongs to the government.

In equity.

J. M. Woolworth, for complainant.

E. Wakely, for respondent.

In 1866 congress made a grant of land to the state of Kansas to aid in the construction of the St. Joseph & Denver City Railroad, which road was to run from Elwood in Kansas, via Maryville, to a junction with the Union Pacific Railroad, or any branch thereof.

In pursuance of the terms of the grant the company filed

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the map of its line with the secretary of the interior on the twenty-eighth of March, 1870. This map was transmitted to the local land office at Beatrice, where it was received on the thirteenth of April following.

On the eleventh of April one Cropsey entered one quarter section included in the grant, and afterwards a patent therefor was issued to him. Knevals claims under the railroad company, and Hyde under Cropsey, and the first question arising in the case was whether the grant to the company took effect when the map was filed with the secretary of the interior, or when it was received by the local officers. The grant contained the condition that the road should be built to a junction with the Union Pacific Railroad, or one of its branches, within ten years. The road was built to a junction with the Burlington & Missouri River Railroad in Nebraska, within the time limited, but not to the Union Pacific, and it was objected by the defendant that the Burlington road was not a branch of the Union Pacific, and therefore that the condition had been broken and the lands forfeited. It was also objected that Cropsey was a *bona fide* purchaser without notice of the location of the railroad, and, therefore, was entitled to protection against its claims. The case was submitted to Mr. Justice MILLER upon the bill and the demurrer thereto, and elaborate printed arguments of the parties.

MILLER, *Circuit Justice*.—1. I am of the opinion that within the meaning of the first section of the act of congress of July 23, 1866 (chapter 212 of that session), granting lands to the state of Kansas for the use and benefit of the St. Joseph & Denver City Railroad Company, "the line or route of the road" was "definitely fixed" when, on the 28th of March, 1870, a map of said location, adopted by the board of directors of the company, was received by and filed with the secretary of the interior as the law required.

It follows that on that day the right to the use and benefit of the sections of land designated by odd numbers, within ten

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sections on each side of that line, became vested in the company, including the quarter section now in controversy, unless it had been previously sold, or otherwise came within the excepting clause of the act.

2. The origin of defendant's adverse title is a purchase made from the United States through its land officers fourteen days after the rights of the company had vested. The equitable title to the land had therefore vested in the company before any interest in it whatever had come to Cropsey, the grantor of the defendant.

3. The rights of the parties in this case are not affected by the question of notice. No other notice was required of the company than filing its map with the secretary of the interior. No other act was necessary on the part of the company to establish its right to the land. No other act could be done by the company towards perfecting the title until so much of the road was built as authorized it to apply for patents for the land. And it will scarcely be contended that until the patents issued, any location by purchase from the government could come in and take it up as vacant land.

It is probable that the strict legal title passed to the state of Kansas for the use of the company by the act of filing the map, and related back to the date of the statute, which makes a grant to the state *in presenti* of lands to be ascertained by the act of locating the route of the road.

But it is sufficient to say that on the filing of the map, there was vested in the company the equitable ownership of the land, an equity which could only be defeated by failure to perform the conditions of the grant. The power in the officers of the land department to sell the land was gone, and the patent issued by them conferred no real right though it gave an apparent title.

It is not a case, therefore, of notice, but a case of priority of right, in which the prior right must prevail.

If it were otherwise, the filing of the map in the office of the commissioners of the general land office at Washington,

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the only notice the company could give, was sufficient to require Cropsey to take notice of it.

4. With the question of forfeiture by reason of failure to complete the road, neither defendant nor his grantor has anything to do. They cannot declare such a failure, nor does a loss of the title arise as a legal consequence out of such a failure. The sale to defendant's grantor was not intended to assert such a forfeiture, because at the date of that sale no ground of forfeiture existed.

This court, however, has settled the doctrine that in cases of this class the right to declare the forfeiture and resume the grant belongs to the United States and can only be made effectual by an act of congress or a judicial proceeding. *Schulenburg v. Harriman*, 21 Wall. 44.

The allegations of the bill demurred to, make a case, therefore, in which complainant being the equitable owner of the land, finds himself embarrassed by an apparent legal title in defendant, and therefore entitled to relief in a court of equity.

The demurrer to the bill is therefore overruled, with leave to defendant to answer within a reasonable time to be fixed by the court.

EX PARTE C. C. COLE.

(District of Iowa. October, 1879.)

1. **OFFICERS OF COURT — POWER OF COURT OVER.**—All courts possess an inherent power of control over all their officials, including attorneys, and these officers are liable to be attached for contempt and punished, by fine or imprisonment, for misconduct, and all except the marshal are liable to be removed from office by the court, for sufficient reason and on proper showing.
2. **ATTORNEYS AT LAW — SUSPENSION — DISBARMENT.**—An attorney may be suspended or disbarred for any matter or thing, whether sufficient to constitute a criminal offense, or create a civil liability, or not, if it shows that he is unfit to be permitted to practice in the courts as one of its officers.
3. **UNFITNESS — HOW SHOWN.**—This unfitness may be shown by proof

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- of crime, or of bad moral character, or of specific acts done by an attorney in the course of his practice, which show him to be unfit to be trusted.
4. **INCITING CLIENT TO ATTACK THE COURT.**—An information charging an attorney with inciting and encouraging his clients, who were parties to a pending litigation, to influence improperly the judicial action of the court in such litigation, by newspaper publications and printed circulars, disparaging the judicial conduct of the court, with intent to intimidate the judges in their action, *held* good on demurrer.
 5. **PARTICULARITY NOT REQUIRED.**—In such an information the precise mode by which the attorney conveyed suggestions to his client, whether by letter, direct oral conversation, or by a message sent through a third person, need not be stated.
 6. **THE INTENT AND ATTEMPT SUFFICIENT.**—It is not necessary in such an information to aver that the publications suggested by the attorney were in fact made by the client. The offense is complete when the suggestion is made in earnest to a party likely to act on it.
 7. **PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.**—Such an information is not to be held bad on demurrer upon the ground that the suggestion being one made to a client concerning a matter in suit, is a privileged communication.
 8. **COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY.**—Short of an attempt to pervert justice by bringing to bear on the judge who is to decide, influences of corruption, intimidation, or the improper weight of personal influence, in a secret and unjustifiable manner, a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of the client. And this privilege extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy.
 9. **IMPROPER PROPOSAL TO INFLUENCE JUDGE.**—A proposition by a lawyer in a letter to his client, that he will visit with his family the family of the judge, and while an honored guest will avail himself of the freedom of conversation, to seek to commit the judge to the expression of opinions favorable to his client, should exclude him from practice in the courts and from the confidence of the judge.
 10. **SAME.**—A proposition by a lawyer in a letter to his client, that he will control newspapers and induce them to attack the judge, is evidence of a purpose on the part of such attorney to improperly influence the judicial action of the judge.
 11. **ATTEMPT TO SECURE PLEDGES IN FAVOR OF CLIENT.**—An allegation in an information against an attorney, that, when the appointment of two different persons at different times as receiver of a railroad was under consideration, he endeavored to secure from them, as a condi-

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tion to his consent to their appointment, a secret promise that each of them would, if made receiver, appoint one Pickering general manager of the road, and one Atherton to some other place in its business, *held* insufficient to warrant disbarment, in the absence of an allegation that the persons named were unfit, or that the pledge was not sought in the interest of his client.

James T. Lane, R. H. Gillmore and others, for prosecution.

Mr. Cumminge and *Mr. Lehman*, for defense.

A committee of the Iowa Bar Association presented to the court an information against C. C. Cole, making certain charges of unprofessional conduct against him, and praying his disbarment. To this information a demurrer was interposed. The hearing on the demurrer was before Mr. Justice MILLER, who states in his opinion the substance of the allegations of the information.

MILLER, *Circuit Justice*.—The proceeding against the respondent in this case is neither an indictment nor information for an offense against the criminal code of the state or of the United States. The matters with which he is charged are not made an offense by any act of congress, and this court possesses no power to try a man for any crime or misdemeanor at common law. It is not, therefore, a prosecution for any crime or misdemeanor known to the law.

But all courts possess an inherent power of control over their own officers. Some of these officers are of the court's appointment, others receive their appointments from different sources. In this court the clerk is appointed by the court, or one of its members; so are certain examiners, masters, commissioners, etc. The marshal is appointed by the president and senate of the United States. Attorneys and counselors of the court are as much officers of the court as those above mentioned. Their office is conferred by the court by an order admitting them to practice in the court. All of these officers are liable to be attached for contempt and punished by fine

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and imprisonment for disobeying an order of the court properly made, or for any other act or misconduct connected with their office disrespectful to the court or prejudicial to the administration of justice.

They are all, except the marshal, liable to be removed from office by the court for sufficient reason and on proper showing.

This reason and this showing is not necessarily limited to criminal offenses or to an act which would create a civil liability. In the case of an attorney of the court, he may be removed from his office of attorney absolutely or for a limited period of time, or in the common phrase, may be suspended or disbarred for any matter or thing proved against him which shows that he is unfit to be permitted to practice in the courts as one of its officers.

This unfitness may be shown by his guilt of a crime, as theft, murder, burglary. It may also be shown by proof of such bad moral character as is inconsistent with such an honorable office. It may be shown by specific acts done in connection with his business in the court or out of it, if it be in the practice of the duties of an attorney, which may show him unfit to be trusted as such, but which are short of any criminal offense. The respondent in this case is proceeded against for such misconduct, and the object is to disbar him.

He is not proceeded against for a crime or misdemeanor under any act of congress; and he is not proceeded against for mere contempt of court. If it was the latter, it would fail, for the act of congress, Revised Statutes, sec. 725, forbids punishment by court for any contempt not committed in its presence. The charges on which it is proposed to disbar the respondent are divided into four separate paragraphs, to each of which a demurrer, which may be treated as the exception of the civil law, is filed; and I am called on to determine whether all of these paragraphs, or how many of them, are sufficient in law to require him to answer the rule served on him to do so.

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The first paragraph reads as follows:

“And in pursuance of the said appointment and by virtue thereof, the said committee of the Iowa State Bar Association do hereby charge that the said C. C. Cole, having been admitted to practice in the said United States circuit court for the district of Iowa, and being an attorney of the said court, and an officer thereof, did during the year A. D. 1877 willfully violate his duties as an attorney of said circuit court in a suit depending in said court, wherein the Farmers' Loan and Trust Company, trustee, was the plaintiff, and the Central Railroad Company of Iowa and others were defendants, for the foreclosure of a mortgage on the said Central Railroad of Iowa, for that heretofore, to wit, on the twenty-sixth day of April, A. D. 1877, and at sundry times both before and after said date, he did willfully and in violation of his duties as an attorney of said court, incite and encourage R. L. Ashhurst and Isaac M. Cate, persons interested in said suit, to influence improperly the judicial action of the said court in said suit, and particularly the judicial action in said suit of the Hon. JOHN F. DILLON, one of the judges of said court, by the publication in the newspapers published in the state of Iowa and other states, and in printed circulars, of articles designed and intended to disparage the judicial conduct in said suit of the judges of the said court, and to intimidate them in their judicial action in said suit; and particularly to influence and control improperly and wrongfully the judicial action in said suit of the Hon. JOHN F. DILLON, one of the judges of the court, by the publication in the newspapers aforesaid and in printed circulars, of articles accusing the said DILLON of improper motives in his judicial action in said suit, and of partiality in his judgments therein, and of warping the law for friendly and other personal considerations, he, the said C. C. Cole, then and there well knowing the said imputations against the said DILLON to be untrue.”

I am of opinion that if respondent did what is here charged against him, he should no longer be trusted as an officer of this court to aid in the administration of justice.

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Divested of legal verbiage, and put in plain English, the charge is that he suggested, advised and incited his clients, parties to an important suit in this court, being at a distance from this state, to influence the action of the court by intimidation applied to its members, by publications in the newspapers and printed circulars; that the purpose was to influence them improperly in their judicial action in that suit—and especially that they were advised and incited to thus influence the action of Judge DILLON, one of the judges of the court, by publications in the newspapers of an abusive character, impeaching his motives and charging him with partiality and warping the law for personal considerations. I will not stop here to argue the question whether this is a legitimate mode of furnishing reasons to a judge for his decision, nor do I think it necessary to consider whether such a mode of winning a judgment is one which a court can tolerate in its own officers.

I am not now considering the right of the newspaper press to discuss for itself the conduct of the judges, in court or out of it, nor the right of any individual to criticise the acts and judgments of the court.

This is a case of an attorney of the court, employed to conduct a suit pending in that court, who advises his client in advance of the hearing of the case or motion in hand, urging his client to endeavor to procure a decision in his favor, by exciting the fears of the judge by the terrorism of newspaper attacks and abusive circulars, under the expectation that rather than endure their repetition the judge will secure repose by a favorable decision.

It is not criticism after the act that is intended. It is threat for the future.

It is my opinion that no lawyer who will advise this as a means of securing a judgment or order or decree of a court should be permitted to practice in that court. Objections are taken to this paragraph aside from the nature of the matters charged.

1. It is said that it is not sufficiently specific as to the man-

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ner or means, by what word, act or letter, respondent made the suggestions to his clients which are complained of. The objection thus stated, whether made to an indictment or information or a plea in a civil action, is to be governed by the same rule, namely: It is sufficient to inform the defendant of the matter with which he is charged, and enable him to make answer as to his guilt or innocence of the charge. The thing here charged is the effort to induce his clients, who are named — Ashhurst and Cate — to publish articles in the newspapers and circulars calculated to intimidate and otherwise improperly influence the judges in their judicial action. That is sufficiently specific. If he did this, he knows it. If he did not, he knows it and can deny it.

I do not see that the precise mode by which he conveyed these suggestions to Ashhurst and Cate, is either a part of the act of inciting them to do it or necessary to the description of the offense or to enable the defendant to answer the charge.

In point of fact the prosecution may not know whether it was done by letter or by direct oral conversation or by message sent through a third person. They may be dependent on the powers of the court to produce this evidence for the first time to themselves as well as to the court.

But respondent certainly knows whether he ever represented, suggested or incited them to do this thing or not. If he did, he must also know how it was done. If he did not, he can safely answer by a denial. It is no part of any system of pleadings in any class of cases that all the *evidence* to support a charge of misconduct must be set out in the indictment, information or complaint.

2. It is said that there is no averment that Ashhurst or Cate ever made any such publication, and that the unexecuted suggestions of respondent can form no ground of removal.

It is proper to repeat here that the respondent is not proceeded against for a criminal offense. It may also be conceded that he cannot be disbarred for the thoughts of his mind uncommunicated to others. The influence of respond-

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ent's conduct in endeavoring to stimulate his clients to use wicked and improper means of influencing the judges in their favor on the question of his fitness to occupy the place of an officer of the court to aid in administering justice, does not depend on his success in that endeavor, but upon his willingness to make that suggestion and the effort to have it carried into operation. If that is his view of the mode in which judgments are to be won or orders procured, he is not fit to be a member of the honorable profession of lawyers.

The act which proves this is the suggestion, and it is complete when the suggestion is made in earnest to a party likely to act on it. This act is sufficient to show the principles which govern his action in similar cases.

3. A third objection is that the suggestion, being one made to a client concerning the matter in suit, is a privileged communication.

This divides itself into two branches. The first is that it is so privileged, that in whatever mode the prosecutors may be able to procure the evidence necessary to establish the charge, the respondent cannot be held liable civilly or criminally for so advising his client.

The reported cases mainly relied on are suits for libel, and whether the respondent, if sued by Judge DILLON for a libel in anything set out in this information, could be held civilly liable, admits of grave doubt. As to much of it he certainly could not. But this is not a suit for libel. The proceeding is not founded on the idea of a personal injury to Judge DILLON. Its basis is an attempt on the part of respondent to influence the administration of justice in a suit pending in court by the use of threats and intimidations. By raising a public scandal, which shall operate on the fears of the judge. It is an effort to organize a conspiracy to defeat the ends of justice.

When called upon by the court to answer for such practices in pain of dismissal from the bar, it is no defense to say, "I only intended to conspire with my clients. I did not urge any one but them to do this thing. I had a legal right to

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incite them in their own interest to frighten the judge until he did what they desired." In the other aspect of the case, namely, whether the persons to whom the communications were made can be compelled to disclose them on the trial, it will be time enough to decide that question when it is raised on the hearing, if the prosecution shall be compelled to resort to that mode of securing the evidence.

I am of opinion that the first paragraph of this information sets forth conduct of the defendant, which, if true, justify this proceeding, and that they are sufficiently set forth to place respondent on his defense.

The second paragraph is made up of extracts from letters written by respondent to Cate and Ashhurst pending certain motions and efforts to get the court to proceed in executing a decree it had already rendered for the sale of the railroad, which was the result of the litigation. Some of these extracts, though censoriously reflecting on the court, *are*, in my opinion, so far protected by the relation of client and attorney existing between respondent and the parties to whom they were written, as that, whether true or false, they cannot become the foundation for expulsion from the bar. For I am very clearly of opinion that short of an attempt to pervert justice by bringing to bear on the judge who is to decide, influences of corruption, intimidation or the improper weight of personal influence in a secret and unjustifiable manner, a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of his client, and that this extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy.

But there are two extracts from these letters which very far transcend this right. They come directly within the principle I have laid down as applicable to the charges of the first paragraph. In one of these extracts respondent acknowledges the receipt of articles of incorporation of the purchasers of the

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road under the sale, which, it seems, required the approval of the court, and in reply, he says:

"I have yours of the twenty-third also with the articles of incorporation inclosed. I am not a sufficient railroad man to be enabled to criticise with any judgment or sagacity. So far as I am able to judge, they are without objection, and I have no doubt will prove acceptable to the court. I was going to suggest to you, whether or not, since the approval by the court, although nominally a judicial act, in this case is essentially a matter of executive conduct, whether it would not be well for myself and wife, in our vacation, to make a short visit to Davenport, to Judge DILLON and family; and while there and before the sale, to present to him the articles of incorporation and discuss them, and get his actual approval of them before the sale, and thus practice on our friends the game they have been practicing on us hitherto. I have no doubt I could get a very frank and thorough expression of his opinion in that way. What do you suggest in respect to that? It is possible that I can go to Davenport week after next."

As it may become my duty hereafter to consider the judgment which ought to be pronounced, if respondent wrote this letter without sufficient excuse, I will not discuss it further than to say that in my opinion the lawyer who will coolly offer to his client to take his wife on a visit to the family of the judge—a visit which should be sacred to friendship alone,—and there, while an honored guest, to avail himself of the freedom of conversation, which it would seem like rudeness in the host to forbid, and in the absence of the other party to the suit, to seek to commit the judge to the expression of opinions favorable to his client which are to govern him in the court, should be excluded from practice in the courts or from the confidence of the judge.

While this court has no control over the social relations of the judge and the lawyers, it has power to exclude such persons from the bar. The flagrant turpitude of such a proposal is not mitigated by the statement that it is a *game*—fit word

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to express it — which the other side have been practicing on respondent's clients. If the entire bar shall ever adopt this rule of practice, and the belief of the respondent that it can be successfully done is true, then will the courts of law instead of deserving the name of courts of justice, become the facile instruments of all forms of fraud and injustice.

Another extract, which reads as follows, is from a letter written to Mr. Ashhurst:

"Please confer with Mr. Cate and Mr. Latrobe, and see whether it is not best to renew our motion at the May term and for you to come here and argue it.

"I think it is, and it is not improbable, that I could control enough of the newspapers of the state, in ventilating the course of the trustee, its attorney, and the court, to awake Judge DILLON to the idea that perhaps he had better let the law take its course than to further warp it for personal or friendly considerations. If you shall advise me of the adoption of the course suggested, I will see that the thorns in the flesh are properly entered."

I think this letter, if ever written, is evidence of the matters alleged in the first paragraph. It is the worst of the whole series of charges against respondent.

As I have already shown that the first paragraph, if sustained by proof, is sufficient, it follows that this, which sets out with more particulars, the facts themselves, is also sufficient.

The third paragraph charges that respondent falsely and libelously stated in a letter, written to Ashhurst, his client, that Judge DILLON "was partial in his judicial action in said suit and warped the law for personal and friendly considerations in said suit." As I have already said, it is my opinion that it is both the right and the duty of the counsel to take into his consideration the question of the existence of such a state of mind in the judge and to confer freely with his client on the subject. And this may and often must be done, if done at all, by letter.

There is no allegation in any part of this information that

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respondent ever expected or desired that these letters would be made public, or would reach the ear of Judge DILLON so as to wound his feelings. There is every reason, in the nature of the case, to believe that this was the last thing the respondent would have wished. There was, therefore, no intentional offense against the judge or against decorum. It is said that the statement was false. I have no doubt it was erroneous; it can hardly be supposed that counsel as deeply interested in his case as these letters show respondent to have been, will pass a very impartial judgment on the partiality of the judge who decides against him.

Still he was entitled to form a judgment and communicate it to his client, and its truth or falsehood cannot be inquired into here. That is one of the class of communications between attorney and client which the patrons of the law should and must protect, for any other rule would work a restriction in the freedom of intercourse between them more injurious to the sound administration of justice than the effects of any mistaken opinion or even false misrepresentation of the attorney. This paragraph is not, in my opinion, sufficient if all it states is true, to authorize action by the court against the respondent.

Paragraphs four and five may be considered together. They allege that when the appointment of two different gentlemen at different times as receiver of the road was under consideration of the court, the respondent endeavored to procure from them, as a condition of his consent to their appointment, a secret promise that each of them would, if made receiver, appoint one Pickering general manager of the road, and Atherton to some other place in its business.

It is not alleged that his client's interest would not have been promoted by the appointment of Pickering and Atherton.

It is a fair inference from all that is said that they very much desired it, and that it was solely on that account that respondent sought the pledge. Nor is it alleged that Picker-

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ing or Atherton were unfit persons for the places for which they were suggested. The gravamen of the charge is, that the pledge sought was a secret one and that the opposite party in the suit would not have consented to the appointment of any one as receiver who had made such a pledge, and the court, if it had known of such a pledge, would not have made him manager. It was an attempt, say counsel, to deceive the court and the opposite party. I confess the action of the respondent, as thus stated, does not show the nicest sense of professional honor.

But we are not to expel a member of the bar of long practice and high standing in the profession because in some transaction he has in the interest of his client failed to come up to the highest standard of professional ethics. This standard is not fixed. It varies with the locality, the times and the delicacy of mind of each member of the profession. The object to be attained here was one beneficial to respondent's clients.

If pursued openly, it was a duty of the respondent to endeavor to effect it. I can see no obligation he was under to the opposite party, to reveal to them that his consent to the appointment of Morrill or Smith as receiver was conditional on action with regard to Pickering and Atherton, or that he had secured from either of them a promise to appoint them.

The only point of slightest doubt is the suggestion of deceiving the court. But he may well have supposed that the court had no right to make the exclusion of Pickering and Atherton from occupation in the business of the road, a condition of any man's appointment. And if he knew they would do so, it may well be doubted whether he was bound to aid the court by telling of the arrangement he had made, or desired to make, with the receiver.

I repeat, that however a nice sense of honorable dealings with the court might have prevented some men from seeking this secret pledge, or induced them, if they had obtained it, to make it known to the court, I am very clearly of opinion that

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the matter as stated in these paragraphs affords no sufficient ground for suspension or expulsion from practice in the court. It is proper to add that the allegations that respondent acted corruptly in this matter, does not change the aspect of the matter unless some corrupt act is alleged. Indeed it is not easy to see where the corruption comes in. If there was any attempt to bribe Morrill or Smith by a pecuniary consideration, surely a matter which thus varied the whole aspect of the case should have been alleged. The three last paragraphs are insufficient.

NOTE.—Upon the announcement of the foregoing opinion, the respondent answered: Subsequently, before the final hearing, the respondent made a satisfactory acknowledgment and apology; whereupon the proceeding was, upon motion of the committee of the Bar Association, dismissed.

THE WESTERN UNION TELEGRAPH COMPANY v. THE UNION
PACIFIC RAILWAY COMPANY.

(*District of Kansas. June, 1890.*)

1. PLEADING — CORPORATION. — An averment in a pleading that a corporation had power to execute a contract, must be taken to mean that it had such power by virtue of the law of its being.
2. PACIFIC RAILROAD SYSTEM — ACT OF CONGRESS, JULY 1, 1862. — The several state railway corporations incorporated into the Pacific railroad system by the act of congress chartering the Union Pacific Railroad Company, approved July 1, 1862, and which were authorized to construct branches, and receive aid from the United States, are subject to the terms and conditions imposed by said act of congress.
3. SAME — TELEGRAPH FRANCHISE. — The Union Pacific Railroad Company is without authority to alienate its telegraph franchise, or any property necessary to the performance by it of the duties imposed by law.
4. SAME — SAME — ACT OF CONGRESS, JULY 2, 1864, § 4. — But the fourth section of the act of July 2, 1864, authorizes said Union Pacific Railroad Company, or any company authorized to construct a branch of the Union Pacific Railroad, to transfer to the United States Telegraph Company, or its successor, the right to construct and operate the line of

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telegraph required by the Union Pacific Railroad charter to be constructed and operated.

5. **CONTRACT—PUBLIC POLICY.**—A provision in a contract between a telegraph company and a railroad company, to the effect that the telegraph company will transmit the family, private and social messages of the executive officers of the railroad company free, is against public policy, and immoral, and taints the entire contract, so that a court of equity will not enforce it, or grant any relief to a party claiming under it.

Demurrer to bill.

C. Beckwith, Williams & Thompson, Geo. R. Peck and W. C. Webb, for complainants.

J. P. Usher and Everest & Waggener, for respondent.

McCRABY, Circuit Judge.—The bill sets forth a contract in writing, entered into between plaintiff and the Union Pacific Railway Company, Eastern Division, of date October 1, 1866, whereby the plaintiff, under certain terms and conditions, was to construct, maintain and operate a line of telegraph along the line and upon the right of way of said railway company.

The bill avers that the parties to said contract are, and were at the time of the execution thereof, existing corporations, with power and authority to make and enter into said contract. The Kansas Pacific Railway Company was the successor of said Union Pacific Railway Company, Eastern Division, and the Union Pacific Railway Company is the successor of the former. It is averred that by the terms of said contract, it was agreed that plaintiff should have the right to add as many wires to said line established as should be necessary for the transmission of its own business, without interference with the working of the wire which, by the terms of the contract, was reserved for the use of the railway company.

The plaintiff further alleges that on the tenth day of February, 1880, it became and was necessary for the transmission of its business to add another wire to said telegraph line,

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between Wyandotte and Brookville, and that for that purpose it procured the necessary materials, and demanded of the railway company permission to erect said additional wire, which was refused; and it is alleged that the several defendants have confederated and combined together, and by force and threats have prevented plaintiff from putting up said additional wire, and that they still prevent the same, and threaten to prevent the same hereafter. It is further alleged that defendants are about, by force and against plaintiff's will, to cut the wires used on plaintiff's said line of telegraph. The prayer of the bill is as follows: "Plaintiff prays the court to enjoin and restrain the defendants, and each and every of them, by whatever name they or either of them may be known, from interfering with plaintiff's right to add any additional wires necessary for the transaction of its business over said line of telegraph, on said poles along and on said railroad line; and plaintiff prays the court to enjoin the servants, agents and employes of defendants, and each of them, from in any way preventing plaintiff, its servants, agents or employes, putting up such additional wires as may be necessary for plaintiff's business. Plaintiff prays the court to enjoin and restrain the defendants, each and every one of them, from cutting any wires heretofore used by the plaintiff under said contract, and running the same, or any of them, into the office or offices of defendants, or any of them, and thereby depriving plaintiff, either permanently or temporarily, of the said wires, or any of them. Plaintiff prays the court to enjoin and restrain temporarily defendants, and each and all of them, their servants, agents and employes, from cutting said wires, or any of them, and from preventing, or in any way or manner whatsoever obstructing or hindering, plaintiff, its agents, servants and employes, from adding such other wire to said poles as may be necessary, and from running said wires, or any of them, into the office or offices of the defendants, or either of them, different from what they now are. And plaintiff prays the court to continue such tempo-

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rary injunction until the final hearing of this cause, and that at such final hearing such injunction be made perpetual. And plaintiff prays for such other and further relief as may, under the facts and circumstances of the case, be deemed proper and equitable, and for costs."

The defendant, the Kansas Pacific Railway Company, demurs to the bill upon the ground that it does not state facts sufficient to constitute any cause of action. The contention of the defendant is, that it appears from the face of the bill that the Union Pacific Railway Company, Eastern Division, had no power or authority to enter into the contract in question, and that the same appears to be against the statute, contrary to public policy and void.

1. Although the bill avers that the railway company had power to enter into the contract in controversy, it must be assumed that by this allegation the complainant intended to say that by virtue of the law of its being it had such power; and it is, therefore, necessary to look into the statutes under which it was organized, and by which its powers were defined and limited. A corporation can possess such powers only as are expressly conferred by statute, or incidental to its express powers.

2. It is conceded that the Kansas Pacific Railway Company, Eastern Division, was originally chartered by an act of the legislature of Kansas as the "Leavenworth, Pawnee & Western Railroad Company," and had, by virtue of its state charter, authority to make the contract in question; but it is insisted that, by accepting the terms of the act of congress making it a branch of the Union Pacific Railroad, it became subject to the laws of the United States relating to that road and its branches, and was thereby disabled from making such a contract. By section nine of the act known as the original Pacific Railroad act, approved July 1, 1862, it was provided that the Leavenworth, Pawnee & Western Railroad of Kansas might construct a railroad and telegraph line over a prescribed route, "upon the same terms and conditions, in all respects, as are

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provided in this act for the construction of the railroad and telegraph lines just mentioned."

By other provisions of the act and by its amendments, large subsidies were bestowed upon the companies building the branches, as well as upon the company which was to build the main line. I am of the opinion that by accepting the terms of the acts of congress, and receiving its benefits, the Leavenworth, Pawnee & Western Railroad Company became subject to all the terms and conditions imposed by those acts, and that neither it nor its successors could enter into a contract not authorized thereby, anything in the original state charter to the contrary notwithstanding.

3. This brings me to the question whether the contract set out in the bill was authorized by the charter of the Union Pacific Railroad Company, and its amendments. I have recently had occasion to consider the proper construction of those acts, and the powers of the companies authorized to construct and operate lines of railroad and telegraph under them, and the conclusion reached was that the Union Pacific Railway Company was not authorized to alienate its telegraph franchise, or any property necessary to the performance by it of the duties imposed by those acts. *Telegraph Co. v. Railroad Co.* 1 Fed. Rep. 745 (*ante*, p. 000).

The contract now before me provides not merely for granting to the telegraph company the right of way along the line of the railway, but it also provides that the railway company shall do no commercial or paid telegraph business from any station where the telegraph company shall have an office, without the consent of the latter. This, in my judgment, amounts to an alienation of the right to transact business for the public generally for pay, as a telegraph company, and that right is the most valuable part of the franchise of a telegraph company. It follows that the contract is beyond the power of the railway company, unless the authority to make it can be derived from the act of 1864, which will next be considered.

4. The fourth section of an act "for increased facilities for

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telegraph communication between the Atlantic and Pacific states and the territory of Idaho," approved July 2, 1864, is as follows:

"And be it further enacted, that the several railroad companies authorized by act of congress of July 1, 1862, are authorized to enter into arrangements with the United States Telegraph Company so that the line of telegraph between the Missouri river and San Francisco may be made upon and along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangements be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroads and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfillment on the part of such railroad companies of the provisions of the act in regard to the construction of a telegraph line; and in case of a disagreement, said telegraph company are authorized to remove their line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of said railroad companies." 13 Statutes, 374.

It is stated, in argument by counsel, that complainant is the assignee and successor of the said United States Telegraph Company, and possessed at the time of making the contract in question, and still possesses, the rights conferred upon that company by the section just quoted; and it is claimed that under this act, if not under the original Pacific Railroad charter, the railway company had power to make the contract. These facts are not averred in the bill, but as the question of the true construction of the section above quoted has been discussed, I deem it best to state my views thereon, especially in view of the fact that, under the allegation in the bill that the railway company had power to enter into the contract, it is the duty of the court to construe any statute under which that power is claimed. I cannot, however, in the present state of the record, determine whether the rights of the United States Telegraph Company had been legally transferred to the com-

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plainant. That question can only be decided upon consideration of the assignment or conveyances under which the transfer was made, and of the laws authorizing such instruments to be executed, and these are not before me. I can only determine, so far as I am concerned, the question whether the railway company could, under the act above quoted, have entered into a contract like the one in controversy with the said United States Telegraph Company. By the law as it stood before the passage of the act of 1864, which is now to be construed, the Kansas Pacific Railroad Company, Eastern Division, was bound to construct a telegraph line of its own. The act of 1864 allowed it to relieve itself of that duty and to devolve it upon the United States Telegraph Company. An arrangement was authorized between the railway and telegraph companies "so that the line of telegraph between the Missouri river and San Francisco may be made upon and along the line of said railroad and branches as fast as said road and branches are built." Made by whom? Evidently not by the railway company, for it was already authorized to erect a line of telegraph, and no arrangement was necessary for that purpose. It was, then, to be an arrangement by which the United States Telegraph Company should erect the telegraph line. It would seem that the transfer of an existing line over part or all of the route was also contemplated, for it is further provided in the same sentence as follows: "And if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfillment on the part of said railroad companies of the provisions of the act in regard to the construction of a telegraph line." I think it plain that under this act it would have been competent for the Kansas Pacific Railroad Company, Eastern Division, to have made an arrangement with the United States Telegraph Company whereby the latter could have erected a line of telegraph upon the line of the railroad, using for that purpose,

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in part or in whole, the poles and wires used by it upon its then existing line. The same policy had been previously adopted by congress. (See section 19 of the original Pacific Railroad charter.) It is, however, contended that the act of 1864, and said section 19 of the original charter, only related to the *erection* of the telegraph line, and did not authorize the railway companies to devolve the duty of operating such lines, after erection, upon the telegraph companies named.

This suggestion has received careful consideration, and my conclusion is that the act authorized something more than the employment of this particular telegraph company to construct the line. No legislation was necessary for that purpose. Congress evidently intended to protect the interest of telegraph companies that had, at great cost, erected telegraphs upon lines west of the Missouri river, and which were in danger of being rendered worthless by the lines about to be constructed by the railroad companies. It did not provide for a sale by the telegraph company to the railroad company of the material of the then existing lines, nor did it provide for a sale of the franchises of the telegraph company. It clearly provided for an arrangement by which the telegraph company might transfer its line *and business* to the line of the railroad. This is made more evident by the further provision that, in case of disagreement, the telegraph company may transfer its line of telegraph upon and along the line of the railroad without prejudice to the rights of the railroad company. The purpose of the act is here made manifest. It was to authorize the transfer of the telegraph line of the United States Telegraph Company to and along the line of the railroad, and permit its operation there, upon such terms as might be mutually satisfactory; or, if no terms could be agreed upon, then as a matter of right in the telegraph company. It was, of course, not the purpose of congress to authorize the telegraph company to establish and construct its line of telegraph along the line of the railroad without the right to operate the same after it was so established and constructed.

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I am, therefore, clearly of the opinion that the fourth section of the act of July 2, 1864, above quoted, authorized the Kansas Pacific Railway Company, Eastern Division, to enter into a contract with the United States Telegraph Company embodying the terms of the contract set forth in the bill, with the exception of the clause respecting the family, private and social messages of the executive officers of the railroad company, which will now be considered.

5. The contract in question provides as follows: "*Fourth*, the business of said railway, including its construction, lands, and all business of the company, and the family, private and social messages of the executive officers, shall be transmitted without charge between all telegraph stations on the line of said railway, and also between all such stations and the city of St. Louis, Missouri, and over all other lines in Missouri, Kansas, Colorado and New Mexico now owned and controlled, or that may hereafter be owned or controlled, by the Western Union Telegraph Company: *provided*, as far as said lines in Colorado or New Mexico are concerned, the said road or roads of the Union Pacific Railway Company, Eastern Division, shall at the time be in process of construction towards Santa Fe, or Denver, or both; and all such business shall be transmitted free of charge over all other lines owned or controlled, or that may hereafter be owned or controlled, by the said telegraph company, within the United States, to an amount not exceeding the rate of \$4,000 per annum, and for any excess above such rate the telegraph company will deduct and abate one-half the regular tariff charges—settlements and payments for such excess to be made yearly."

That this provision of the contract is against public policy and therefore void, is, to my mind, entirely clear. It amounts to an agreement to give to each of the officers of the company who made the contract, and to each of their successors who should maintain it, a valuable consideration for his official action in that behalf; a consideration of a private and personal character, enuring to the officers' private benefit and

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gain, and not to the benefit of the company or other stockholders. It is said, however, that this feature of the contract may be eliminated, and that the remainder may stand and be enforced. It is true that the policy of the law is to effectuate rather than defeat a contract, and to this end parts or provisions which are comparatively unimportant, and which may be severed from the contract without impairing its effect or changing its character, will sometimes be suppressed. 2 Parsons on Con. 505.

But the clause above quoted cannot be set aside as unimportant. It constituted, to say the least, one of the considerations on which the contract was made, and it is well settled that "if the contract be made on several considerations, one of which is illegal, the whole contract is void, and that whether the illegality be at common law or by statute." Chitty on Contracts (8th Am. Ed.), 572. An agreement to give to an officer of a corporation anything of value, in consideration for his assent to the execution of a particular contract, is, without doubt, an immoral and unlawful agreement, and one which equity will not enforce; and a careful examination of the subject leads me to the conclusion that no affirmative relief can be granted upon a contract which includes this as one of its features, although it be in other respects unobjectionable. There is, of course, no merit in the defense here, so far as the railway company is concerned, for both officers and stockholders were undoubtedly aware of the existence of the contract, and have for over thirteen years acquiesced in it and enjoyed its advantages. It is for the protection of public interests that courts take notice of the immorality of such contracts, whenever, by any means, made aware of it. In the present case the court cannot ignore this objectionable feature of the contract, since it is set out in full by the complainant in the body of the bill, and all its provisions are brought to the attention of the court by the demurrer. The contract being tainted with immorality, the law is well settled that a court of equity must leave the parties to it where it finds

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them, without affirmative relief, and this whether the contract has been executed or not. *Marshall v. R. Co.* 16 How. 314; *Bank of U. S. v. Owens*, 2 Pet. 539; 2 Redfield on Railways, 576, 584; Pomeroy on Specific Performance, §§ 284-6; *Wright v. Rindskopf*, 43 Wis. 344; *Mc Williams v. Phillips*, 57 Miss. 196; *Guernsey v. Cook*, 120 Mass. 501; *Setter v. Avery*, 15 Kan. 157.

A contract may be *ultra vires*, and yet, if it is not immoral, it may, after it has been executed, in whole or in part, form the basis for equitable relief. If, therefore, it was conceded that this contract was beyond the powers of the railway company, it would still, but for the clause now under consideration, be proper to hold the parties bound by their executed dealings under it. Such was my opinion in the case of *The Telegraph Co. v. The Railway Co.*, *supra*, and to that opinion I still adhere. But when a party comes into a court of equity and asks affirmative relief upon a contract which, in one of its provisions, is upon its face immoral and corrupt, the court can only say to the complainant, in the language of the supreme court in *Creath v. Sims*: "However unworthy may have been the conduct of your opponent, you are confessedly *in pari delicto*; you cannot be admitted here to plead your own demerits. Precisely, therefore, in the position in which you have placed yourself, in that position we must leave you." 5 How. 204.

The officers of a railway company are *quasi* public officers. Their duties are of a fiduciary character. They are, in an important sense, trustees. To pay them individually anything of value for executing a corporate contract is grossly unlawful, and taints such contract with moral turpitude. Vast interests, in which the public, as well as the immediate parties, are deeply concerned, are entrusted to the control and management of such officials; and, in my judgment, there are important considerations of public policy which demand that courts of justice shall hold them to a strict account, and shall never for a moment recognize as valid a contract obtained by

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paying directly or indirectly to such officials any consideration, whether large or small.

The demurrer to the bill is sustained.

Complainants may have leave to amend, if desired; otherwise there will be a decree dismissing the bill. And unless it can be made to appear by an amended bill that complainant has at least a probable right to retain possession of the telegraph lines and property independently of the contract, the injunction must be dissolved.

FOSTER, *District Judge*.—I concur in the conclusion reached by the circuit judge that the demurrer to the bill should be sustained, but am not prepared to express an opinion on the construction of section 4, act of July 2, 1864, or the powers conferred on the defendant company by that act. My judgment only extends to what appears in the bill. And under the provisions of the Pacific Railroad act of 1862, and the powers and duties conferred and imposed thereby, I am of the opinion that this contract is *ultra vires* the defendant company and therefore void. Am further of the opinion that the provision in the contract for transmitting the private, social and family messages of the executive officers of the railroad company, vitiates the contract and renders it illegal.

EDWARDS, Trustee, v. WOODBURY and others.

(*District of Minnesota. June, 1880.*)

MORTGAGOR AND MORTGAGEE — WASTE — STATUTE — CONTRACT.—A statutory provision that a mortgagor may continue to use the mortgaged premises during the period allowed for redemption in the same manner as they have been previously used, may be waived by contract.

Motion for injunction.

Bigelow, Flandrau & Clark, for motion.

W. E. Hale, contra.

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McCREARY, *Circuit Judge (orally)*.—I have considered this case upon the motion for an injunction. This is a case in which there has been a decree of foreclosure upon a mortgage. The prayer is that the court will enjoin the removal of earth and sand from the premises, on the ground that it is an impairment of the security. The premises are about six acres, within the corporate limits of the city of Minneapolis. The defendant is engaged in making brick, and for that purpose is taking earth and sand and removing it from the surface of the premises. It appears that he has been in that business for some years, and was so engaged at the time of the giving of the mortgage. No attempt was made by the mortgagee to interfere with him prior to the time of the sale under the foreclosure, but the purchaser at that sale, the present complainant, now insists that he has a right to stop this use of the premises. That cutting away earth and removing it from the surface of the soil is waste at common law, is very clear, and I should have no difficulty with this case had it not been for the statute of Minnesota, which provides as follows: "Section 296. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on application of the purchaser or judgment creditor; but it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family, while he occupies the property."

This property was used as a brick-yard prior to the foreclosure of the mortgage, and for several years previously. I should be inclined to the opinion, though not entirely clear upon the subject, that under that statute the party might continue to use the land as a brick-yard, and to take the earth

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from the surface, even though it might impair the security, were it not for a clause in the mortgage itself, to which I will call attention.

The mortgage provides that the mortgagor shall keep the premises "free from all taxes and assessments whatever, and shall not do, or permit to be done, in, about, or upon the premises, anything that may in anywise tend to weaken, damage or diminish the security." My conclusion is that this statute does not prevent parties from agreeing or stipulating in the mortgage that nothing shall be done to impair the security. The statute furnishes a rule which would apply in the absence of a contract, but does not prevent the parties from making their own agreement. Here is a plain and unequivocal stipulation that the mortgagor shall not do anything to impair the security of the mortgage. In my judgment the statute does not deny to the purchaser at the sale the benefits of the stipulation. The proofs make it clear that the removal of earth from these premises does impair, to a greater or less extent, the security of this purchaser. The mortgage debt is evidently about as much as the property is worth. It is manifest that cutting and carrying away the surface of the earth is an injury to the property.

An injunction will be allowed.

Cox, Trustee, v. PALMER and others.

(*District of Minnesota.* June, 1880.)

MORTGAGE — INTERLINEATION — BURDEN OF PROOF.—"If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the

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same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution."

In equity. Suit to foreclose mortgage.

H. J. Horn, for complainant.

Rogers & Rogers, for respondents.

McCRAEY, *Circuit Judge*.—This cause has been argued and submitted upon the merits. It is a suit brought to foreclose a mortgage. Upon the face of the mortgage there appears an interlineation, the words "block 19" being interlined upon the face of the instrument. Without these words the property described could not be located. They are, therefore, material, and the question is whether they were inserted before the execution of the mortgage, or afterwards. This question must be decided upon the proof, and in view of the law applicable to such cases. The mortgage was twice recorded. The words in question do not appear in the *first* record, but do appear in the second. Several years intervened between the first and second recording. It is contended by the defendants that the interlineation was made after the first recording, and without authority, while the plaintiff insists that the words were in the instrument as originally executed, and were omitted by the recorder in copying the same upon the record. The only testimony offered by the defendants is that of Henry H. Finley, one of the defendants, and who is the person who drew the mortgage. He testifies that the words "block 19" were not in the instrument when originally executed and filed for record. But the strength of this testimony is greatly impaired by certain facts which are in the evidence. In the first place, Mr. Finley has, since the execution of the mortgage, become the purchaser of the premises, and has, therefore, a strong interest in defeating the lien

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of the mortgage. Besides, he was the lawyer who drew the mortgage for the mortgagee, and the court will not presume, in order to give additional weight to his testimony, that he purposely omitted these material words of description, or that he accidentally did so, and afterwards, with knowledge of the mistake, and without informing his client for whom he had drawn the mortgage, undertook to defeat the mortgage by purchasing the property. The court will rather presume that, if the words were omitted from the original instrument, Mr. Finley did not know it at the time. If he did not know it at the time, he has clearly had no opportunity to ascertain it since, for he shows, by his own testimony, that he has not had possession of the instrument since its execution. Again, it appears beyond question that the interlineation is in the handwriting of Finley, and, since he has not seen the mortgage since the time of its execution, it follows that he must have inserted the words in question at that time.

It further appears, from the testimony of Mr. Horn, a witness for plaintiff, that when he called the matter of the interlineation to the attention of Finley, sometime before the commencement of this suit, the latter stated that the mortgage was all right, and that he had himself made the interlineation. It is true that Finley gives an entirely different version to this conversation, but, as he is an interested witness, his testimony must give way to that of Mr. Horn, in so far as they are in conflict. The most that can be claimed, with respect to the evidence bearing upon this question, is that it is evenly balanced, and, assuming that to be the case, my decision must turn upon a question of law. What is the presumption in such a case? Upon this question there is an apparent conflict of authority. I think, however, it is apparent only, and not real. There are cases in which it has been held that an interlineation is presumably an unauthorized alteration of the instrument after execution, and that the burden is upon the party offering the instrument in evidence to show the contrary. There are also cases in which interlineations have been held to

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be *prima facie*, *bona fide*, and that the burden is upon the party attacking the instrument to show that it was altered after execution. But I think that one rule governs in all these cases, and it is this: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink,—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution. *Stoner v. Ellis*, 6 Ind. 152; *Huntington et al. v. Finch & Co.* 3 Ohio St. 445; *Nichols v. Johnson*, 10 Conn. 192; *Burnham v. Ayer*, 35 N. H. 351; *Beaman v. Russell*, 20 Vt. 205.

These considerations dispose of the case so far as defendant Finley is concerned. The other defendants cannot claim to be *bona fide* purchasers without notice, because the mortgage was recorded the second time before they purchased.

Decree for plaintiff for amount of note and interest, to be assessed by the clerk.

Dows and others v. EKSTRONE

(District of Minnesota. June, 1880.)

WAREHOUSEMEN — RECEIPT HOLDERS — FRAUD — EQUITABLE RELIEF.—

When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting.

DOWS v. ELSTRÖME.

Replevin brought by the plaintiffs against the defendant, who is sheriff of one of the counties of Minnesota, to recover possession of a quantity of wheat which the plaintiffs claim as their property. The defendant justifies the taking as sheriff, and shows that he seized the wheat by virtue of several writs of attachment against one Harris, who, defendant alleges, was the owner. A jury was empanelled, and after the plaintiffs' testimony was all in, and after argument by counsel, the opinion of the court was announced as follows:

Davis, O'Brien & Wilson, for plaintiffs.

Strobeck & Plumley, for defendant.

McCRAE, Circuit Judge.—It is evident that the case turns upon a question of law which arises upon the admitted facts, which are as follows: Harris was a warehouseman, and also a dealer in wheat, his place of business being at Litchfield, Minnesota. He received grain for storage and issued warehouse receipts for the same, which receipts, under the statute of the state, were negotiable, and were evidence of the title to the wheat named therein. Rev. St. of Minn., 1879, p. 1013. The plaintiffs hold such receipts for about twelve thousand bushels of wheat. The plaintiffs in the attachment suits hold other certificates, calling for several thousand bushels in addition. Harris, the warehouseman who issued the receipts, either never received in store all the wheat represented as received, or, after receiving it, he sold or disposed of a portion of it.

Just prior to the commencement of this suit he absconded, leaving in his warehouse only about three thousand bushels of wheat to meet the outstanding receipts, or only about one-fifth the quantity required. In this state of things the creditors, represented by the defendant, attached all the wheat in the warehouse as the property of Harris, and the plaintiffs, holding a majority of the receipts, replevied from defendant,

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claiming that their receipts entitled them to what was left. Can they recover? Clearly not. When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting. No one of such receipt holders can recover at law the whole, nor could any number of such holders, less than the whole number, recover possession as against the remainder. This case must be brought in a court of equity, where all the claimants can be heard and decree can be rendered establishing the rights of each with respect to the property in controversy. It is a controversy which cannot be settled at law. I will, therefore, direct that a juror be withdrawn, and that either party have leave to file a bill in chancery.

HAMMERGEN v. SCHUERMIER and others.

(District of Minnesota. June, 1880.)

1. **NONSUIT—JUDGMENT.**—An involuntary nonsuit does not constitute a judgment on the merits.
2. **MOTION FOR JUDGMENT ON PLEADINGS.**—Where a jury was empanelled and sworn and the proof submitted, after which, upon motion of defendant's counsel, the court dismissed the case for the reason that plaintiff had not made out a case, *held*, that the record did not show a final adjudication of the matters in issue.

Motion for judgment for defendant on the pleadings.

Davis, O'Brien & Wilson, for plaintiff.

Gordon E. Cole, for defendant.

MILLER, Circuit Justice (orally).—This motion is founded on the idea that the former adjudication in the state court was

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on the merits of the case, and, therefore, a bar to the action. The case was, and is now, an action for personal injuries. It was submitted to the state court, the jury sworn, the proof submitted to the jury, and when the plaintiff got through with his * * * evidence the defendant moved the court to dismiss the action because the plaintiff had not made out a sufficient case, and the record states that the judge, for that reason, dismissed it. Now, that is an ordinary case of nonsuit. Nonsuit is voluntary or involuntary. Voluntary nonsuit is where a party submits to the court and says, "I have not made out a case," and asks that it be dismissed; involuntary nonsuit is just this case: when the case is before the jury, and the plaintiff having introduced all of his evidence, the defendants say, "It is not sufficient to go to the jury, and we ask for a nonsuit," and the court says, "You shall have it." All such cases, from time immemorial, have been considered as not being judgments on the merits. The court says: "As far as you have gone you have not made out a case. That does not say that you cannot go any further some other time, and taking the facts you cannot make a case, but says up to this time you have not made out a case; you have not made a case which requires that judgment on the merits should be rendered; you simply have not made a case up to the present time." Defendant's counsel says, in this particular case the judge of the state court based the decision on the ground that the plaintiff has himself shown by his testimony that he was in fault, and that he was guilty of some contributory negligence, and he cannot recover if that has been shown on the trial, and that had been so found by the jury. If he had gone to the jury, and the court had so instructed the jury, it would have been a trial on the merits. But the only way that we find this is in the opinion of the court. That opinion, in my judgment, is no part of the record. I doubt very much whether that opinion can be produced in this case—that is, to show it to the jury. I don't wish to preclude the question, but I don't see how you can produce that as a decision on the

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merits. Defendants say that the plaintiff had shown his own contributory negligence. It is very obvious that contributory negligence is a defense. That has been decided over and over, and it was no part of the plaintiff's case. It was part of the defendant's case. If there was any proof of it he must have drawn it out by cross-examination in some way. I have no doubt that the plaintiff in this case had a right to go to the jury on the question of contributory negligence, but the judge took it away from them. There was no trial on the merits, and, therefore, no bar to the action.

Motion for judgment on the pleadings is overruled.

NUGENT v. WANN.

(District of Minnesota. June, 1880.)

1. PRIVATE WAY USED BY PUBLIC WITH CONSENT OF OWNER.—A proprietor of land who opens a private way upon his own premises, is under no obligations to keep the same in repair for the safety of persons who may pass over it uninvited.
2. SAME — DUTY TO PUBLIC.—The proprietor of such a way owes no duty to the public to keep it in repair for their use, and whoever uses it does so at his own risk; provided that, knowing that the public are in the habit of using the way, the proprietor has no right to place therein anything that will endanger their safety.
3. SAME — POLICEMAN.—A policeman, being a peace officer, has the right to pursue a criminal through a private alley at any hour of the night.
4. USE OF PRIVATE ALLEY BY PROPRIETOR.—The use of an alley way by the proprietor or his tenants, customers and employes, as a way for hauling fuel and carrying earth excavated by the proprietor, will not render the same a public way.

Davis, O'Brien & Wilson, for plaintiff.

Bigelow, Flandreau & Clark, for defendant.

McCREARY, Circuit Judge (*charging the jury*).—The court instructs you in this case as follows: The plaintiff sues the

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defendant to recover damages resulting to him from injuries received by falling into an excavation made by the defendant in a place alleged by the plaintiff to have been a public alley or drive way over certain premises described in the petition.

Defendant denies that said alley or drive way was public; alleges that it was purely private and was never used as a public way; that he was not bound to warn plaintiff of the danger of passing over it, and that he had a right to make, in the alley, the excavation into which the plaintiff fell, and was not bound to notify plaintiff or the public of its presence therein or of the danger of falling into the same.

The duty of the defendant with respect to the alley way, at the time of the accident, depends upon the character of the way as to being public or private, and upon the purposes for which it had been used. It appears in evidence that this alley way was laid out under a written contract between the adjoining proprietors, and the court, having considered that contract and construed it, instructs you that it constituted the alley way in question, as originally laid out, and, so far as opened, a private way for the use of the owners of the adjoining premises and their tenants, customers and employees, and not a public highway.

It follows from this that you must find for the defendant, unless you find, from the evidence, and in view of what I shall hereafter say, that the alley way was, with the assent of defendant, opened to and used by the public as a passage way.

A proprietor of land who opens a private way upon his own premises is under no obligation to keep the same in repair for the safety of persons who may pass over it uninvited; and even when such proprietor permits persons generally to pass over such way he does not make himself liable for accidents or injuries which may result from the fact that the way is not a safe one, or not in repair.

The proprietor of such a way owes no duty to the public to keep it in repair for their use, and whoever uses it does so at

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his own risk, provided only that the proprietor, knowing that the public are in the habit of using the way, has no right to place therein anything that he knows will endanger the safety of persons passing over it, without giving warning of the danger.

If you find that the alley way in which the plaintiff was injured was a private one, and was not open to and used by the public, you will return a verdict for the defendant. It is claimed by the plaintiff that the alley way in question, though laid out as a private way, was in fact open to and used by the public generally, and that it had been so used for some time prior to the accident, and that plaintiff knew that fact, and that, therefore, it was not negligence in him to attempt to pass over it; also that the defendant knew that the public were in the habit of passing that way, and that persons so passing would be in danger of falling into the excavation. It is for you to decide from the evidence whether these were facts.

In determining this question you will consider all the facts and circumstances developed in the evidence. You will consider the purposes for which the way was opened; any evidence before you as to the purposes for which, and the persons by whom, it was used; the character of the way itself as to being well worn by the passage of persons and vehicles, or otherwise; the character of the passage from the street into the alley, and whether the same was such as to indicate a purpose to open the passage for the use of the public; and from all the evidence, and not from anything outside of the evidence, you will determine whether the alley way was used by the public, and regarded by them and by plaintiff as open to their use. If you find that it was so opened and used, you will then inquire and decide whether the defendant, knowing that fact, dug in the alley a dangerous excavation or pit, which he knew, or had reasonable cause to believe, would endanger the safety of any person passing, and left it open and unguarded, giving no notice or warning of its presence; and

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if this is found, from the evidence, to be true, you will then inquire and determine, from the evidence, whether the plaintiff, in the performance of his duty as a peace officer, and passing over the way in the night-time, without negligence or want of ordinary care on his part, fell into the excavation and was injured. The owner of land has a right to use it as he pleases, so he does not thereby endanger the person or property of another. The defendant had a right to make the excavation in question for the purpose of preparing a receptacle for fuel, or for any lawful purpose, and he was under no obligation to warn any one of the danger of passing that way, unless the fact was that the place where the excavation was made had been used, and was, at the time of making the same, in use by the public as a passage way, and the defendant knew that fact.

From what I have said you will observe that you are to confine your inquiries to the following questions:

1. Was the alley way used as a passage way by the public at and before the time of the accident, and was the defendant aware of that fact?

If you decide this question in the negative, you will find for defendant, and no further consideration of the case is necessary.

2. But if you find the question just stated in the affirmative, you will inquire and determine whether the plaintiff, without knowledge or notice of the excavation, was passing along the alley way on lawful business, and fell into the same and was injured?

3. If the first and second questions are decided in the affirmative, it will then be necessary for you to consider the question of contributory negligence on the part of the plaintiff. Although you may find that the defendant was guilty of negligence, under the instructions I have given you, yet the plaintiff cannot recover by reason of the defendant's negligence alone, if he (plaintiff) was also guilty of negligence, which caused or contributed to the injury. The plaintiff was

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bound to use such care as a man of ordinary prudence would use under all the circumstances. You are to determine, from the evidence, whether there was a want of care on the part of plaintiff, within the meaning of the law as thus defined, and you will take into consideration, in determining this question, all the circumstances, including the fact that the plaintiff was a peace officer, and had a right, at any hour of the night, to pursue a criminal through the alley, as well as the fact that the night was dark, and that he failed to take a light with him, and the fact that he had a light when he entered the alley, which went out, and which he did not relight. If the plaintiff failed to use ordinary care and prudence, and his failure to do so caused or contributed to his injury, he cannot recover, since the law is that where both parties are at fault the party sustaining the injury cannot recover.

If you find for the plaintiff you will assess his damages at such sum, not exceeding the sum claimed in the petition (\$8,000), as you believe to be just and reasonable, under all the circumstances, taking into account the physical injuries to the plaintiff, his pain and suffering, the expenses of nurses and physicians, his ability to earn a living since the accident, as compared with his ability to do so before it occurred, and the probable effects upon his health and ability to earn a living in the future, as shown by the evidence.

In view of all the evidence you will, if you find for plaintiff, fix his damages at a reasonable, but not an unreasonable or excessive, sum.

The use of the alley way by the proprietors, and their tenants, customers and employes, as a way for hauling fuel and carrying earth excavated by said proprietors, however extensive this use may have been, would not impose upon defendant any duty of warning the public or plaintiff of the presence of the excavation therein. The defendant's liability, if it exists, must be based upon satisfactory proof that the alley way had been used by the public.

Upon the question of defendant's negligence, the burden of

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proof is upon the plaintiff. Upon the question of contributory negligence on the part of plaintiff, the burden of proof is upon the defendant.

The defendant having acquired the right to make the excavation upon the land of Dr. Wharton, under the written contract in evidence, is to be considered the proprietor of said excavation, for the purposes of this suit. The fact that it was not on his own land neither increases nor diminishes his liability. See 99 Mass. 216; 2 Eng. Law, 308; 118 Mass. 278; 11 Allen, 384; 56 Me. 498; 7 Cent. L. J. 11; 68 N. Y. 283; 8 Allen, 342; 83 Pa. St. 322; 54 Minn. 501; 21 Minn. 207; 17 Wall. 657; 2 Dillon, 294; 1 Thompson on Negligence, 307-309; Wharton on Negligence, secs. 83, 345, 782, 789; 2 Wait's Actions and Defenses, sec. 71; 49 Cal. 87.

JOHN PARLIN *et al.* v. JOHN L. STONE *et al.*

(*Western Division, Western District of Missouri.* June, 1880)

1. DEFECTIVE MORTGAGE — DECREE TO REFORM. — Where by mistake the name of the mortgagee, in a mortgage, was omitted, *held*, that decree should be rendered to reform the instrument by inserting the same.
2. ESTOPPEL. — If the owner of a tract of land represents to a creditor that the land belongs to another, and induces such creditor to take a mortgage executed by the person so represented as owner, and to extend the time for paying a debt, the owner of the land is estopped to claim it as against the lien of the mortgage.
3. COLLATERAL NOTES — ACCOUNTING. — If a mortgagee has received notes as collateral for the mortgage debt, and has collected the same, an accounting to ascertain the sum due should precede decree of foreclosure.

In equity.

Waters & Winslow, for plaintiffs.

Botsford & Williams, for defendants.

McCRAEY, *Circuit Judge*. — This cause has been argued

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and submitted for final decree upon the merits. The plaintiffs bring their suit in equity to reform and foreclose a mortgage.

The following are the material facts established by the proof:

1. Defendant John L. Stone was indebted to plaintiffs in the sum of about sixteen hundred (1,600) dollars, part of which was his individual debt, and the balance was the debt of John L. Stone & Co.

2. This indebtedness was partially secured by collateral notes turned out by defendants.

3. Plaintiffs called upon said John L. Stone for additional security, and after some negotiation it was agreed that they were to have a mortgage on two tracts of land.

4. The defendant John L. Stone represented to the plaintiffs that one of the said tracts of land was defendant's property, and that the other tract was the property of his son, Jeremiah Stone, and of record in his name.

5. Relying upon these representations, the plaintiffs accepted two mortgages, one of which was executed by defendant John L. Stone, and the other by defendant Jeremiah Stone; the latter being the mortgage sued on in this case.

6. The representations of said John L. Stone, that the title to one of said tracts was in his son Jeremiah Stone, was not true in fact. The title to said tract was at the time in said John L. Stone, who had executed a deed to his son Jeremiah, which had never been delivered, and has never since been delivered, but has probably been destroyed.

7. In executing the mortgage sued on, the names of the plaintiffs, as mortgagees, were omitted by mistake.

Upon consideration of these facts and the law applicable thereto, I have reached the following conclusions:

1. That plaintiffs are entitled to decree reforming the mortgage sued on, by inserting the names of plaintiffs as mortgagees, in accordance with the intention of the parties to the instrument. It is insisted by counsel for defendants, that

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inasmuch as no grantee is named in the mortgage the instrument is void, and the defect cannot be cured by parol evidence. This point is not well taken, since it appears upon the face of the mortgage itself, that the consideration for the mortgage moved from the plaintiffs; that it was given to secure a debt due to them; and that the omission to fill the blank left for the insertion of the names of the grantees, with the names of plaintiffs, was a mere oversight.

2. Inasmuch as the defendant John L. Stone, by his acts and representations induced plaintiffs to believe that the land in controversy had been conveyed to Jeremiah Stone, and inasmuch as acting upon that belief, the plaintiffs extended the time for the payment of their debt, and took a mortgage upon said land executed by said Jeremiah Stone to secure the same, John L. Stone is estopped to claim the land as against the lien of said mortgage. This, upon the doctrine of estoppel *in pais*. It would be a fraud upon the plaintiffs to permit said John L. Stone now to deny what by previous declarations and conduct he asserted, when on the faith of his representations the plaintiffs have acted. A person having title to real estate, who represents another as the owner, and thereby induces a third party to accept from that other a conveyance by deed or mortgage for a valuable consideration, is in equity bound by such conveyance, and is not permitted to set up his own title against it. *Rice v. Bunce, Adm'r*, 49 Mo. 231; *Story's Eq. Jur. sec. 385*; *Sweeney v. Mallory*, 62 Mo. 485; *Hart v. Giles*, 64 Mo. 175.

3. Inasmuch as the plaintiffs have received and collected certain collateral notes assigned to them as security for this debt, an account should be taken before a master or otherwise, as the court may direct, to ascertain the sum due the plaintiffs, and decree should be rendered reforming the defective mortgage and foreclosing the same as against all the defendants, including the said John L. Stone. The other defendants named, who are subsequent purchasers, are clearly shown to have purchased with notice of plaintiffs' equities.

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A. MATTHEWS, Assignee, v. WESTPHAL, HINDS & Co. and
• JOHN McCLAY & Co.

(District of Iowa. May, 1880.)

1. **BANKRUPTCY — FRAUDULENT PREFERENCE — FOUR MONTHS' LIMITATION.**— A chattel mortgage given to secure a creditor, more than four months prior to the filing of a petition in bankruptcy against the mortgagor, and kept from the record until within the four months, is not a fraudulent preference within the meaning of the bankrupt act.
2. **SAME.**— The four months' limitation begins to run from the time the preference is given, and not from the time when creditors have notice of it.
3. **SAME.**— *Harrie v. National Bank*, 4 Dillon, 183, overruled, upon the authority of certain decisions of the supreme court of the United States.

J. W. Shields, for plaintiff.

Shiras, Van Duzee & Henderson, for defendants.

McCABY, Circuit Judge.—This is an appeal from the decree of the district court in a proceeding in bankruptcy. The suit was brought by plaintiff as assignee of one Jorgenson, a bankrupt, to set aside a chattel mortgage executed by the bankrupt to defendants, and to recover the value of the property conveyed thereby, upon the ground that the same was fraudulent, at common law, under the statutes of Iowa, and under the bankrupt act. The court below held as follows:

1. That the chattel mortgage was *bona fide*, and not fraudulent at common law, or under the Iowa statutes.
2. That it gave defendants such a preference as is forbidden by the bankrupt act to be given to any creditor, within four months from the time of the filing of the petition in bankruptcy. Rev. Stat. 5128.
3. That said preference not having been given within said period of four months, the plaintiff could not recover.

I have no difficulty in affirming these rulings upon the two first propositions. The conclusion upon the third was reached by the learned district judge, as appears from his opinion, not

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without much hesitation. The doubt grows out of the fact which appears from the evidence, that the chattel mortgage in question, though executed more than four months prior to the filing of the petition in bankruptcy, was, by agreement between the parties, kept from the record until a later period, and was filed for record within the four months. It appears that this agreement not to record was made to prevent the institution of proceedings in bankruptcy by other creditors of the mortgagor. Under these circumstances, did the four months begin to run from the execution of the chattel mortgage, or from the recording of the same?

It was held by this court in *Harris v. Exchange National Bank*, 4 Dillon, 133, that in a case where a deed of trust was kept off the record to prevent the knowledge thereof from coming to other creditors, the four months' limitation did not begin to run until the filing of the instrument for record. This decision would be followed as settling the rule for this court, were it not that certain decisions of the supreme court are brought to my notice which seem to establish a different doctrine.

This makes it necessary to examine carefully these decisions, since if the case of *Harris v. The Bank* cannot be harmonized with them, it must of course yield to them as the superior authority.

The cases cited are: *Burnhisel v. Firman*, 22 Wall. 170; *Sawyer et al. v. Turpin et al.* 91 U. S. 114. And it is insisted that the doctrine of these cases is supported by the case of *Bean v. Brockmire*, decided by Mr. Justice MILLER in the circuit court for the eastern district of Missouri. 1 Dillon, 24.

In *Burnhisel v. Firman* this precise question did not arise, but the court laid down the general doctrine that in order to bring a security for a debt, within the provisions of the bankrupt law, it is necessary that all the prescribed conditions should concur. And it was said that among these conditions "the cardinal one is, that the security should be given by the

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bankrupt within the time specified," and with the view to giving one or more creditors a preference. The court further said: "It is as much the purpose of the law to sustain all valid claims arising beyond the time specified, as it is to strike down the frauds within that time which it denounces."

The case chiefly relied upon by appellee is *Sawyer et al. v. Turpin et al.* The facts in that case were briefly as follows: The petition in bankruptcy was filed October 22, 1869. On the fifteenth of the preceding May, the bankrupts had conveyed to Turpin the property in controversy, by an instrument in form a bill of sale, but in substance a mortgage, to secure a large debt. This instrument was not recorded, and it was insisted that it was kept off the record and kept secret by agreement between the parties to it. On the thirty-first of July, 1869, the bankrupt executed a mortgage to the same party on the same property, and to secure the same debt. It was nothing more than a change in the form of the security, and therefore, if the first was void, so was the last.

The court said, speaking of the original bill of sale: "Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded, and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any; but there were none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument, and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution."

And the court further say, "it has been argued, however, on behalf of the assignees, that the bill of sale of May 15 was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin

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that it should not be recorded, and should be kept secret. If the fact were as alleged, it is not perceived that it would be of any importance, for it is undeniable that the bill of sale rested on a valuable consideration, to wit, the debt of \$27,839 in gold, due to Novelli & Co., and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was, therefore, a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the bankrupt act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded, or that possession should not be taken under it."

In *Bean v. Brockmire*, Mr. Justice MILLER stated the rule by which to construe the fifth section of the bankrupt act, as follows: "The acts mentioned in the section are not such as were forbidden by the common law, or generally by the statutes of the states. Nor are they acts which in their essential nature are immoral or dishonest. For a man who is insolvent, or approaching insolvency, to pay a just debt, is not morally wrong, nor was it forbidden by any law in this country previous to the bankrupt act; and though a preference of creditors, by transfer or assignment of property by an insolvent, may sometimes be unjust to the other creditors, it was not forbidden by many of the states. It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine, it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the bankrupt act were fully aware of all that has just been said. But they were about to frame a system of laws, one main feature of which was to provide for the distribution of the property of an insolvent debtor among his creditors, and they adopted wisely, as the general and pervading rule of distribution,

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equality among creditors. But they found that this general principle could not without hardship be made of universal application. When a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purposes of the bankrupt law.

"The bankrupt knowing that he must soon be helpless would desire to pay or secure favorite creditors. They knowing his inability to pay and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors.

"In this dilemma, congress said we cannot prescribe any rule by which a preference would be held to be morally right or wrong. And it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will therefore adopt a conventional rule to determine the validity of these preferences.

"In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that he is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction, if otherwise honest, shall stand; but if by the debtor himself, or any of his creditors, that law is invoked within four months, the transaction shall not stand; but the money or property received by the party shall become a part of the common fund for distribution." The doctrine of these cases is still further illustrated by the case of *Clark v. Iselin*, 21 Wall. 360. It is, I think, quite evident, from these authorities, that the supreme court does not regard the four months' limitation as an ordinary statute of limitations, analogous to statutes regulating the time within which actions shall be commenced.

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Counsel for appellant refers to the case of *Bailey v. Glover*, 21 Wall. 342, where it is held that the second section of the bankrupt act, which requires that all suits by or against an assignee in bankruptcy shall be brought within two years after the cause of action accrues, is a statute of limitations, and to be construed as other statutes of that class. But there is a clear distinction between that section and the one now under consideration. The former fixed and limited the time within which suits could be brought, and was therefore clearly a statute of limitations pure and simple. The latter describes the acts which shall constitute a fraudulent preference, and has no relation to the matter of limiting the time for bringing suits. It is not a statute of limitations within the usual and ordinary meaning of those terms. In describing the acts which will amount to a preference, congress has seen fit, in this section, to make the time when the preference is given an essential element. It must be "within four months of the filing of the petition by or against the bankrupt." No exception is expressed, and I think it clear from the rulings of the supreme court, above quoted, that none can be implied.

Nothing is said about notice of the preference to other creditors or about the recording of the instrument, when there is one by which the preference is given. The preference may be by procuring or suffering an attachment or seizure of the debtor's property, by payment, by pledge, by assignment, transfer or conveyance, directly or indirectly, absolutely or conditionally. Notice to other creditors could be given by recording, only in the single instance of a preference by means of a conveyance absolute or conditional. If it be by payment, or by assignment or pledge, it will hardly be claimed that an agreement not to make it public would prevent the running of the four months. It would be very unjust to apply a different rule to the creditor who receives a conveyance or mortgage. These and other considerations seem to have led congress to fix an arbitrary period, or, in the language of Mr.

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Justice MILLER, they saw fit to "adopt a conventional rule to determine the validity of these preferences."

I am constrained, therefore, notwithstanding the force of Judge DILLON's reasoning in *Harris v. The Bank*, to concur in the opinion of the district judge.

The decree of the district court dismissing the bill is affirmed.

NOTE.—Since this opinion was written, my attention has been called to the fact that the same question has recently been decided in the same way by the United States district court for the northern district of New York, in which an opinion was announced by WALLACE, J. (See *Ansbal, Assignee, v. Heacock*, 2 Fed. Rep. 169.) G. W. M.

THE UNION PACIFIC RAILWAY CO. v. THE BURLINGTON & MISSOURI RIVER RAILROAD CO. IN NEBRASKA, and THE OMAHA & SOUTHWESTERN RAILROAD CO.

(District of Nebraska. June, 1890.)

1. EMINENT DOMAIN — RIGHT OF WAY — STATE LEGISLATION. — The right of way of the Union Pacific Railway is not property of the federal government set apart for its own public use, so as to exempt it from the operation of a law of the state of Nebraska respecting the crossing and connecting of railroads, and the condemnation of property for those purposes.
2. SAME — FOREIGN RAILWAY CORPORATIONS. — Sections 97 and 113 of the general statutes of the state of Nebraska, respecting the crossing and connecting of railroads and the condemnation of property for those purposes, are applicable to foreign as well as domestic railway corporations.
3. SAME — CONCURRENCE OF MAJORITY OF COMMISSIONERS. — The concurrence of a majority of commissioners in the condemnation of a right of way, in the exercise of the power of eminent domain, is a public matter, within the meaning of the rule that, when authority is vested in three or more persons to determine a public question or matter of public concern, a majority have power to decide, provided all act on the matter.

In equity. Motion to dissolve injunction.

U. P. R'y Co. v. B. & M. R. R. Co. in Nebraska, and O. & S. R. R. Co.

A. J. Poppleton, for complainant.

J. M. Woolworth and *T. M. Marquette*, for defendants.

McCRARY, *Circuit Judge*.—This case is before me on a motion to dissolve the injunction heretofore allowed restraining respondents from extending their railroad track across that of complainant. The case is as follows: The complainant is a corporation created by and organized under the act of congress known as the Pacific Railroad Charter, approved July 1, 1862, and acts amendatory thereof.

The respondents are corporations organized under the laws of Nebraska. The complainant owns and operates the Union Pacific Railway, extending from the Missouri river westwardly across the state, and the respondents own and operate a line from Omaha to Lincoln. The respondents, desiring to extend their track across that of the complainant for the purpose of connecting with the Omaha & Northern Nebraska Railway Company, instituted proceedings under the law of Nebraska, in the proper state court, for the purpose of assessing the damages accruing to the complainant on account of the crossing of its track, and also for the further purpose of designating the point at which said crossing should be made and the manner of crossing. The statute under which these proceedings were instituted is as follows (section 113, Gen. St. Neb. 195):

“Every railroad company shall have power to cross, intersect, join, and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, and switches, and other conveniences, in the furtherance of the objects of its connections. And every company whose railroad is, or shall hereafter be, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the

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points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners, to be selected as provided in this subdivision."

The section referred to as regulating the proceedings is section 97, p. 191, and is as follows:

"If the owner of any real estate, over which said railroad corporation may desire to locate their road, shall refuse to grant the right of way through his or her premises, the probate judge of the county in which said real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said probate judge, and not interested in a like question, unless a smaller number is agreed upon by the parties, whose duty it shall be to inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land to the use of said railroad corporation, and make report in writing to the probate judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and the said county clerk shall file, record and index the same in the same manner as is provided for the record of deeds in this state; and such record shall have the like force and effect as the record of deeds, in pursuance of the statute in such case made and provided. And if said corporation shall, at any time before they enter upon said real estate for the purpose of constructing said road, pay to said probate judge for the use of said owner, the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their railroad over and across said premises; *provided*, that either party may have the right to appeal from such assessment of damages to the district court in the county in which such lands are situated, within sixty days after such assessment; and in case of such appeal the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified, to the county clerk, to be

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filed and recorded, as hereinbefore provided, in his office; but such appeal shall not delay the prosecution of the work on said railroad, if such corporation shall first pay or deposit with said probate judge the amount so assessed by said freeholders; and in no case shall said corporation be liable for the costs of such appeal unless the owner of such real estate shall be adjudged entitled, upon the appeal, to a greater amount of damages than was awarded by said freeholders. The company shall, in all cases, pay the costs of the first assessment; *provided*, that either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited shall remain in the hands of the probate judge until a final decision be had, subject to the order of the supreme court."

Commissioners were appointed as required by the statute, and, after being qualified, they proceeded in the performance of their duties, and reported as follows:

"That said crossing shall be made in the east part of lot number seven (7), in block number one hundred and fifty-six (156), in the city of Omaha, as shown on the plat marked Exhibit A; that the manner of said crossing shall be at an angle of fifty-eight degrees and fifty-eight seconds, upon a grade even with that of the Union Pacific Railway's track at that point, and with steel templates four (4) inches in width, with two and a half ($2\frac{1}{2}$) inches width of head, or whatever is necessary to make a good and safe crossing at that point; that the compensation to be paid to the Union Pacific Railway Company for such crossing shall be one thousand dollars (\$1,000). All of which is respectfully submitted.

[Signed]

"SAMUEL E. ROGERS.

"GEO. SMITH.

"MICHAEL DONOVAN.

"CHARLES TURNER."

If the statute is applicable to this case, and has been followed in the condemnation proceedings, the complainant is bound, and has no remedy except the right to contest the

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question of damages on appeal to the district court. Counsel for complainant insists that the proceedings in condemnation are void upon several grounds, which will now be considered.

1. It is claimed that, inasmuch as the complainant's franchise is derived from the United States, no state legislation is valid which provides for condemning the right of way for another railroad across its right of way and track.

It is now well settled that the right of eminent domain is a right inherent in every government, and that it belongs alike to the states and to the United States. Each, within its own sphere of governmental action, may exercise it. *The United States v. Chicago*, 7 How. 185; *Kohl v. The United States*, 91 U. S. 367.

Should a case of conflict between the state and federal government arise, the paramount authority of the United States under the constitution would, of course, prevail. Thus, if the United States has, by proper proceedings, condemned and taken land for a fort, arsenal, navy yard or lighthouse, or for a post-office, custom-house or court-house, it would not be in the power of the state, in the exercise of its right of eminent domain, to take the same property. But the present case does not come within this principle. The United States has never condemned the right of way of the Union Pacific Railway, and taken it for its own use for public purposes, within the meaning of the rule just stated. It has only chartered that company, given it the right to construct and operate a railway, and granted to it the right of way over public lands along its line, together with the right to take private property for the same purpose upon making just compensation. The distinction between this and the condemnation of land under the right of eminent domain for national purposes, is too plain to require elaboration. I am clearly of the opinion that the right of way of the Union Pacific Railway is not property of the federal government set apart for its own public use, so as to exempt it from the operation of the law of the state of Nebraska, above quoted, respecting the crossing and connecting

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of railroads, and the condemnation of property for those purposes. It is the property of the corporation acquired under a law of the United States. If, however, it were conceded to be the land of the United States, unless held for governmental purposes, it would, even in that case, be subject to the state's power of eminent domain. Land owned by the United States, as a mere proprietor, and not used for any of the purposes of national government, may be taken by the state for public use. *U. S. v. Railroad Bridge Co.*, 6 McLean, 517.

It has been held by the supreme court of the United States that the Pacific Railroad is subject to state taxation. *The Railroad Company v. Peniston*, 18 Wall. 5. It was insisted in that case that the Pacific Railroad was created by congress for public and national purposes, and that, like a national bank, it was an instrument of the general government, and not subject to state jurisdiction for purposes of taxation. But this position was not sustained. It is difficult to see upon what principle property can be held to be so exclusively within the federal jurisdiction as to be beyond the reach of the state's power of eminent domain, and yet subject to state taxation.

2. It is suggested that the statute under consideration was intended to apply only to domestic railway corporations created under the laws of the state, and such foreign corporations as might by state legislation be authorized to extend their roads into the state. Upon this point it is only necessary to say that the statute in terms applies to "every railroad company," which must be held to mean every such company operating a railroad within the state. It is not to be presumed that it was intended to exempt the Union Pacific Railway from the operation of the act, since to do so would be to prohibit the crossing of its line by other roads, and thus to prevent the operation of an unbroken line of railway communication between northern and southern Nebraska.

3. It is insisted that the award of the commissioners is void because only four of the six commissioners concurred in

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and signed it, although they all took part in the proceedings and deliberations. The law upon this subject is that where authority is vested in three or more persons to determine a public question or matter of public concern, a majority have power to decide, provided all act on the matter. If the matter be one of private concern all must concur, unless provision is made for a decision by a less number. *Schenck v. Peay*, 1 Wool. 175, 187; *Young v. Buckingham*, 5 Ohio (Hammond), 485-490; *Ex parte Rogers*, 7 Cow. 526, and note *a*; *Cruger v. Railroad Co.*, 12 N. Y. 190.

That the condemnation of a right of way in the exercise of the power of eminent domain is a public matter, within the rule, is not only clear, under the authorities, but also upon principle, since the proceedings can be justified only upon the ground that the land should be taken for public use and for the public interest.

The motion to dissolve the injunction is sustained.

LEWIS v. COUNTY COMMISSIONERS OF BARBOUR COUNTY.

(District of Kansas. July, 1880.)

1. MUNICIPAL BONDS — NEGOTIABILITY — LEGISLATURE. — It is competent for the legislature to make the negotiability of municipal bonds dependent upon their delivery by the treasurer of state.
2. SAME — BONA FIDE PURCHASER — FRAUD. — A purchaser of such bonds, purporting upon their face to have been issued under the provisions of a statute containing such condition, is not a *bona fide* purchaser without notice, where such bonds were fraudulently issued, without being delivered by the treasurer of state.

The material facts are stated in the opinion.

Grant & Grant, for plaintiff.

1. The bonds sued on belong to a company known as the Trust, of which plaintiff is the head or chairman, and, by

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arrangement with his colleagues, all coupons to be put in suit are treated as put in his hands as sole holder and owner. Suit is properly brought in his name. *Thayer v. Johnson Co.*, 4 Otto, 631.

2. Defendant is estopped by the recitals from denying the validity of the bonds sued on. *Douglas Co. v. Bolles*, 4 Otto, 104; *Brooklyn v. Ins. Co.*, 9 Otto, 362; *Block v. Commissioners*, 9 Otto, 686; *Coloma v. Eaves*, 2 Otto, 484; *Rock Creek v. Strong*, 6 Otto, 272; *Randolph Co. v. Post*, 3 Otto, 502; *East Lincoln v. Davenport*, 4 Otto, 801; *Calhoun Co. v. Galbraith*, 9 Otto, 214; *Marcey v. Oswego Township*, 2 Otto, 637; *Brooklyn v. Ins. Co.*, 9 Otto, 362; *Orleans v. Platt*, 9 Otto, 676; *Marion Co. v. Clark*, 4 Otto, 278; *Grand Chute v. Winegar*, 15 Wall. 355; *Dresser v. Construction Co.*, 3 Otto, 92.

Edward Stilling and Thomas P. Fenlon, for defendants.

1. It is squarely admitted by the stipulation of facts before the court, that the bonds in question were *fraudulently* put in circulation. This admitted fact shifts the burden of proof, and requires the plaintiff, who thus admits that he holds and sues upon *fraudulent* bonds, to establish to the satisfaction of the court, by competent evidence, that he is a *bona fide holder* for value. 1 Daniels on Negotiable Instruments, p. 610, sec. 815; 12 Ohio St. 541, and numerous cases therein cited.

2. It was competent for the legislature to prohibit the negotiability of the bonds sued on absolutely, or under such restrictions as it chose to throw around them. On this point see 21 Mich. 415; 16 Barb. 556; 5 Duer, 270.

3. The cases in the supreme court of the United States cited by counsel for plaintiff are not in point. The principles that governed those cases were the principles of negotiable commercial paper. By the terms of the law these bonds were not negotiable until the happening of certain events, and that these events did not happen is admitted.

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McCRAEY, *Circuit Judge*.—This is an action brought to recover judgment upon certain municipal bonds issued by the authorities of Barbour county, Kansas. By agreement of parties a jury has been waived, and the cause submitted to the court upon an agreed statement of facts.

The defense is that the bonds were *fraudulently* issued, and that plaintiff is not a *bona fide* holder for value.

The agreed statement shows, and counsel for plaintiff admit, that the bonds were fraudulently issued, so that the only question for determination is as to whether the plaintiff is a *bona fide* purchaser without notice.

The bonds upon their face purport to have been issued under the provisions of an act of the legislature of Kansas, entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water powers and other works of internal improvements, and providing for the registration of such bonds," etc. Laws 1872, ch. 68, p. 110.

The eleventh section of the act is as follows:

"Sec. 11. That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge or other work of internal improvement, either by donations thereto or the taking of stock therein, then, upon the subscription being made therefor as hereinbefore provided, the officers of such county, city, or township [shall thereupon issue the bonds of such county, city, or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original or a copy of the subscription—setting forth its terms in full—to the treasurer of state, which said bonds shall be held by the said treasurer of state in escrow, until the conditions in the terms of said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of the said subscription being in all things fully complied with, then the treasurer of state shall deliver such bonds

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to the parties entitled thereto, who shall have the same registered as hereinafter provided: *provided*, that *such bonds shall not bear interest or be negotiable until after the delivery and registration thereof*; and *provided further*, that in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by said treasurer of state cancelled and redelivered to the county, city, or township issuing the bonds; and *provided further*, that this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same."

The meaning of this section is plain. It was intended to protect the tax payers of the counties in Kansas against an unauthorized or fraudulent issue of bonds under the act without a compliance with its provisions. Prior to its passage the law had been settled that, in the absence of legislation to the contrary, bonds purporting on their face to have been issued and delivered by the authorities of a county in pursuance of law, operated in the hands of a *bona fide* purchaser to estop the county from denying their validity.

The legislature of Kansas undertook to provide by law certain safeguards against fraud. These are set out in the act above mentioned. All such bonds were to be delivered to the treasurer of state, to be held by him in escrow, until the terms of subscription should be fully complied with, and *upon such compliance* to be by him delivered to the parties entitled thereto. Such delivery by the treasurer is made by the act a condition precedent to the negotiability of the bonds. The proviso declares "that such bonds shall not bear interest *or be negotiable* until after the delivery and registration thereof." The agreed statement shows that the bonds in question were by the terms of the subscription to be placed in the hands of the treasurer of state, in escrow; to be delivered, \$50,000 when the railroad subscribed to should be completed to Medicine Lodge, and \$50,000 when through the county; that no part of the railroad was ever built; that the bonds were not

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delivered to the treasurer, but to one Hutchinson, who procured their registration by the auditor of state, and fraudulently put them in circulation. They were never in the hands of the treasurer of state, and were, of course, never delivered by him.

If, therefore, the statutory provision above quoted is to have the force and effect evidently intended by the legislature, the bonds must be held non-negotiable and bad in the hands of the plaintiff. But it is strongly urged by the counsel for plaintiff that the county is estopped to deny the negotiability of the bonds because they appear on their face to be negotiable, and purport to be issued in accordance with the statute. I suppose it is competent for the legislature of a state to prescribe such conditions as it may deem proper with respect to the negotiability of any bonds it may authorize a municipality to issue. It may provide that such bonds shall not be negotiable at all; and, if so, why may it not also provide that they shall be negotiable only upon condition that they pass through the hands of the treasurer of state, and are by him delivered? This imposes upon the purchaser only the duty of examining the records of a public office, or of inquiring for information of a public officer, to ascertain the fact. The authorities are uniform that such a purchaser must take notice of the terms of the statute under which such bonds are issued, as if the same were set out in full on the face of the bonds.

In delivering the unanimous opinion of the supreme court, in *McClure v. Township of Oxford*, 94 U. S. 429, Mr. Chief Justice WAITE said: "To be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which, upon their face, refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements."

True, the purchaser may presume compliance with such provisions of the statute as relate to the manner of exercising powers conferred by law upon officers of the county. If the power to issue the bonds exists in law, and the bonds recite a compliance with it, the recital is conclusive. *Orleans v. Platt*, 99 U. S. 676. But this doctrine applies to negotiable instruments having the property of commercial paper. It has never been extended to a case like the present, where, by the terms of the statute, the instrument is declared not negotiable until delivered to the treasurer of state, and by him to the party entitled thereto. If this provision is to be regarded as incorporated in the bonds, then how can it be said that the instruments are negotiable on their face? If we are to read the statute as a part of each bond, then they appear on their face to be negotiable only upon the condition named in the act.

If a corporation should issue a bond negotiable only when countersigned by its president, no lawyer would doubt that a purchaser would take it at his own peril if not so countersigned. It is difficult to discover the difference between such a case and one where the bond appears by its terms to be negotiable only upon the condition that it shall pass through the hands of a state officer, and be by him delivered. If it appeared in this case that the bonds were delivered to the treasurer of state, and by him to an innocent purchaser, I am not prepared to say that this would not be a sufficient protection to the holder, even if the delivery had been wrongful.

The decision of the treasurer upon the question of compliance with the terms of the subscription would, I think, estop the county, for the county made him its agent for the purpose of deciding that question. But since it appears that the bonds were never delivered to the treasurer, and that the purchaser might have ascertained that fact by an inquiry addressed to that official, I am of the opinion that he purchased at his peril. To hold otherwise would be to nullify the statute, which was passed for the very purpose of providing certain safeguards against the fraudulent issue of bonds by agents of

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the county. If the statute is construed so as to permit such agents to estop the county by such fraudulent issue, it is without vitality. I think the statute is notice to the purchaser of bonds issued under its provisions that such bonds are not negotiable unless delivered through the treasurer of state, and that such purchasers must make inquiry as to the fact, or purchase at their own risk. The bonds were not negotiated by the agent authorized by law, to wit, the treasurer of state. If that official had negotiated them, the *bona fide* holder might, as already suggested, be protected upon the ground that the treasurer was presumably performing his duty, and the purchaser had the right to rely upon that presumption. But these bonds were negotiated by a stranger, having no official relation to the county. Whoever buys under such circumstances must inquire as to whether the treasurer of state has delivered the bonds. The law constitutes the treasurer of state the agent of the county for the purpose of issuing these bonds, and made their negotiability dependent upon the condition precedent of delivery by him. If he had performed this duty — if he had *acted* as agent, — however irregular or even unlawful his action, the county might be estopped. But not so where he did not act at all, and the bonds were set afloat by the fraudulent act of another. No representation by a pretended agent can ever establish the fact or extent of agency.

If Hutchinson represented that he was authorized to negotiate the bonds, he could not thereby bind the county. The agent of the county for the purpose was named by law as well as by the act of the county, and there was no excuse for accepting without inquiry, as final, the statements of any other person. *N. Y. Life Ins. & Trust Co. v. Beebe*, 3 Seld. 364. The plain meaning of the statute is that the bonds are not to be regarded as issued until delivered under the act by the treasurer of state. Until so delivered they are in escrow, and of this the public has notice in the terms of the law itself.

In *Chisholm v. City of Montgomery*, 2 Woods, 584-595, Mr. Justice BRADLEY said: "The plea that the city is estopped

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by the act of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped, by the acts or declarations of its officers, from denying their authority to bind it. *The Floyd Acceptances*, 7 Wall. 666. Finally, the plea that the plaintiffs are *bona fide* holders of the bonds cannot avail where the defense is want of power to issue them. Of this defect the plaintiffs were bound to take notice. Had the power to issue the bonds existed, and had the question been whether certain preliminary conditions had been complied with, the plea might, under certain circumstances, have been a good one."

If this is the law when an officer of the corporation has exceeded his power, *a fortiori* it is the law of the present case, where the officer who was authorized did not act at all, and an outsider, for purposes of fraud, undertook to do so.

The conclusion thus reached renders unnecessary any consideration of the other questions discussed by counsel.

Judgment for defendants.

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WETMORE and others v. ST. PAUL & PACIFIC R. R. Co.

(*District of Minnesota. June, 1880.*)

MORTGAGE — FORECLOSURE — IMPEACHING DECREE. — After confirmation of the sale of a railroad under decree of foreclosure, holders of the mortgage bonds will not be allowed, at a subsequent term, to be made parties to the original foreclosure suit, for the purpose of impeaching the decree, sale, and confirmation as fraudulent, although in the order of confirmation the power to make further order is expressly reserved. The proceedings and sale in this case considered, and *held* free from fraud.

On June 14, 1879, the St. Paul & Pacific Railroad, its land grant, etc., were sold under a decree of the United States circuit court for Minnesota, entered April 11, 1879, in a suit for foreclosure of a trust mortgage, securing bonds to the amount of \$15,000,000, and were purchased by a corporation organized by the holders of a large majority of the bonds. On June 21, 1879, the sale was confirmed, and the property delivered to the purchaser, the order of confirmation, however, containing this clause: "This order is made by and with the consent, and at the request of, the trustees, the complainants, and with the consent of the parties defendant, and the right to make any further order is reserved."

After the confirmation, certain bond holders filed a bill in the same court to vacate the decree and sale as fraudulent, which bill was dismissed. See *Kropholler v. Kennedy*, 2 Fed. Rep. 302. Thereupon, the same bond holders and others presented a petition at the June term, 1880, praying that they might be made parties to the original foreclosure suit, and that the decree, sale, and confirmation might be set aside as fraudulent.

This petition was heard before MILLER and NELSON, JJ.

John M. Gilman and *C. K. Davis*, for petitioners.

Geo. B. Young and *R. B. Galusha*, *contra*.

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MILLER, *Circuit Justice (orally)*.—This case, which has been very fully argued before us, and which we have taken into consideration as thoroughly as we are able at this term, is one of very great importance, considering the sum involved in the controversy. The purpose of the petition is no less than to set aside the sale of a railroad which is perhaps worth \$20,000,000 or more; a road which has been reorganized since the purchase, with a new set of directors, a new set of stockholders, very largely and above all, a new set of bond holders. The road was purchased under a decree of this court, the purchase was confirmed, and a new company organized, which has been in possession of the road over a year, and has issued, as I say, some \$10,000,000 or \$15,000,000 of new bonds, held all over the world; and now original bond holders in the old company, representing \$1,500,000, come and ask that all these proceedings be set aside, and that we proceed *de novo* to sell the road. These petitioners were not parties to that suit in the sense in which they now seek to be made parties. The first thing that they ask in the present proceeding is that they may be made parties. If they were parties at all—as in some sense they were, and represented by their trustees in the proceedings of foreclosure,—they were not parties in such a sense as would enable them to control the litigation, or come forward now as parties originally engaged in the litigation; and they, therefore, seek, very properly, if they are to have any relief in this proceeding, to be made parties in the first instance. The first question that presents itself is whether they can be made parties.

Taking all to be true that they say in their petition, the case stands that, during the proceedings of foreclosure, these petitioners ought to have been represented, and were legally represented, by the trustees, plaintiffs in the foreclosure suit. The foreclosure was manfully resisted by the corporation for three or four years. It was obvious that the mortgage ought to be foreclosed and the road sold, as the interest had not been paid for years. The present applicants state that the road, at

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that time, was worth say \$8,000,000. Fifteen million dollars of bonds were liens upon it, with whatever other claims there might have been against it, besides the interest coupons, so that the road had a bonded debt of twice the amount these petitioners say it was then worth. It was, therefore, obvious that it was just and right to foreclose the mortgage, and sell the road for the payment of those debts.

During this litigation it became apparent to the court that this road had to be sold. They finally entered a decree for the sale. It has been said in the argument that that was a consent, and, therefore, was something of an *ex parte* proceeding, but the record does not show any such state of the case as that. It shows very clearly that the parties were present, and although there is, in some parts of the record, a preliminary statement that such and such parties were present in court, and consented to the decree, or submitted a decree which they desired to have entered, the record goes on further to state that the court did not enter that decree, but that it took the paper and entered a decree upon its own consideration. It was, therefore, a decree on a full consideration by the court — one which met its approval, upon an examination of the merits — and it ordered the sale. The sale was had. A part of the original bond holders were, under a special organization, according to the laws of Minnesota, purchasers. That did not settle the controversy or the rights of the parties absolutely. The master who made that sale was required to report it into court. He did report it, and the sale was confirmed.

The language of that order differs but little from the ordinary language made use of in decrees, to the effect "that further orders may be made upon a footing of this decree;" and I cannot believe that when it was made it was in the contemplation of the court who was confirming this sale that the "further orders" there spoken of was such an order as would set aside the sale. That was the thing they were passing upon. Who has ever heard of a decree which disposes finally of millions of property — a decree under which the purchasers were

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to take possession and get a final deed, and under which they would enter upon the management of the property and create new rights, by bonds and all that sort of thing — who ever supposed that such a decree as that was to stand for nothing more than a mere preliminary or interlocutory order, which the court could set aside at any time that, in its judgment, sufficient reasons for not confirming the sale should be brought to bear? It is much more in conformity with reason, with precedent, and common sense, to believe that the “further orders” referred to here are such orders as might be necessary for the distribution of the funds as between the parties, and the payment of the bonds which had to come in, and which might be disputed as to their ownership — probably for the delivery of the possession (for I do not see anything in this decree which requires the delivery of the possession), probably for the making of a deed (for I do not see anything here about the making of a deed). There are fifty things you can imagine which would be consistent with the confirmation of the sale, and which might yet require further orders of the court. I have not the slightest idea that after all the consideration and all the trouble that preceded the sale, and all the parties coming in and agreeing to sell, and consenting to it, that the court simply said: “We confirm this sale, subject to the setting aside of the confirmation whenever we think proper.” Such a thing would be plainly against the interests of the purchasers, as well as against the interests of the parties. I therefore think there is nothing whatever in that order which justifies the interference that is asked in this case.

Now, that sale being confirmed, a deed made by the master, property turned over and delivered to the purchasers, those purchasers having reorganized under another corporate name, doubtless a great deal of the stock that they held passed into the hands of other men — certainly the bonds that they issued upon the strength of that new organization, to the extent of \$8,000,000, having passed into the hands of other men,— these parties now, for the first time, come into this court and ask

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that they be permitted to upset all this transaction, to do that which they did not seek in the five years of litigation, namely, to be made parties to this suit, and then to be treated in the double aspect of persons who are parties to the suit and having all the rights of parties from the beginning, and also in the aspect of persons who were not parties to the suit, and whose rights have not been foreclosed.

No authority is shown, no precedent is shown, and I do not believe any can be shown, for such a proceeding. It is so anomalous, so unusual, so much out of the way, that I think it requires express authority in the way of precedent or statute to show that such a thing as that can be done. The counsel, apparently seeing this difficulty, have made an order accompanying the confirmation proceedings the foundation, to a large extent, of this application. There is a single sentence at the end of the long order concerning the confirmation. The first part of that confirmation is: "That the said report, the said foreclosure sale, and all proceedings thereon, be and the same are hereby, in all things, confirmed." There are several orders relating to the distribution of the proceeds, and what the master should do with the money, and so on, and then it winds up: "This order is made by and with the consent and at the request of the trustees, the complainants, and with the consent of the parties defendant shown above, and the right to make any further order is reserved."

The argument in favor of opening this case by these petitioners, who are not parties, is that we will permit them to be made parties; that this order is sufficient to open up everything. *First*, that it is sufficient to go back and open up the original decree; but if not, that it is certainly sufficient to allow the court, upon such representations as they here make, to set aside the order of confirmation, then to set aside the sale, and then to order a resale, or take such steps as may be just to the parties.

On the whole, then, we are of the opinion that there is no principle or precedent which would warrant these petitioners

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being made parties to this suit with a view of making such motion in the case.

In the next place, we are of opinion that this order is not to be construed as extending to any such relief as is asked by these petitioners.

We perhaps ought to stop there. I understand that a bill in chancery, in the nature of an original bill, or a bill of review, has been brought into this court, and demurrer thereto sustained by Judge NELSON, which, of course, is subject to appeal.¹ I feel bound to say that if these parties are entitled to any relief in regard to this transaction it is by some such bill as that, and not by a proceeding to go under the foundation of this suit by being made parties to it, and then seeking to controvert matters which were error in the proceedings. If there has been such fraud practiced upon these parties by their trustees as would justify any relief in connection with that suit, it must be by such a bill as that, whereby they come in and set up their own interest, and show how they were cheated and defrauded. But I must say—I think I have a right to say—perhaps it may be of value in further litigation (although I would not be bound by it in the supreme court), that I have not seen such evidences of fraud in this proceeding as to justify the court to set aside this sale.

It seems to me that here was a case of a mutual interest by bond holders and others at hazard, whose purpose and object was to have that road sold to satisfy the bonds. All of them must have desired that the road should be sold to satisfy their debts.

I have already myself decided, on a plea in the original suit concerning the removal of the first trustees, and the substitution of others, that that was rightfully done. Of course, I think so now. The road ought to have been sold. It was the duty of the trustees to procure its sale as soon as possible. They did, with great energy and perseverance, proceed in this

¹ See *Kropholler v. Kennedy*, 2 Fed. Rep. 302.

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court, and finally obtained, after years of litigation, a sale of that property, for the purpose of paying these debts. A sale was had, and it is said that one reason why it should be set aside was that it was sold for an inadequate sum. It was sold for a sum above what the court fixed, as chancery practice calls it, as an "upset price."

Of course the court, in fixing an upset price, intended to say that it was better that it should sell at that price than not to sell at all, and the court had taken the necessary means to get all the information on the subject possible, as the case stood at that time. It is wrong to suppose that the same court will now set aside the sale, which brings a million and a half of dollars, because the objection that now, in the light of a year or two after that, in the improved circumstances and the prosperous times, in the value attaching to that road growing out of the connections newly made, we are now to consider the thing as of the present time, in relation to its value at the time the same was made. This is one of those constant, everyday events, of people who have let things slip out of their hands, coming back afterwards to endeavor to secure the value which they failed to recognize or secure at the time. Nothing hindered these bond holders from bidding. It is said there was a million and a half dollars among them. They could have bid as well as the other bond holders. The trustees did not feel disposed to fight them; they left them to protect themselves.

I must say, also, in regard to the trustees, that I don't see (although by the decree they had the power, and perhaps a conditional instruction, that they should purchase that property if they thought it was selling for a totally inadequate price) that we can say they did not exercise their best judgment about that when they let it go. We do know that there were large expenses to be paid; that there was a large sum of money in cash to be paid before it could be bought by the trustees and paid for in the bonds of the corporation. We know that there were a million of dollars of debentures and other interests that

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had to be provided for before the road could be purchased by the bonds, and we do not know of any adequate means that the trustees had to raise the cash and the amount of these debentures.

I must say, in regard to the argument urged here more than once by Mr. Gilman, that these trustees should have sold the land for that purpose, does not strike me as being an argument of very great weight. They could not have sold land in time to raise that money in any ordinary mode, in any satisfactory mode, in any mode that would not have been liable to greater objections, or as great, as to let the road be bought in by a majority of the bond holders. I myself do not see any fraud committed by these trustees.

The great objection, however, is that these bond holders commenced proceedings long ago under the foreclosure proceedings to organize themselves into a body of men by a committee for the purpose of buying the road. In regard to that, it is to be said that they excluded nobody — none of the bond holders—from coming in on the same terms as themselves. They invited every one to come in with them. These petitioners, representing a million and a half, who now hold these bonds, stood out and declined to come into the arrangement, and took no steps to protect themselves or the property. What right have they, when these parties spent money, time and trouble to have this road sold, to claim all the advantages which diligence and labor and money expended; and especially the money for these debentures, in the idea that they were trying to get the road into the hands of a receiver and of keeping it up? What right have they to come in now and say: "We avail ourselves of your labor, money and time for the simple reason that you undertook to get this road sold for the purpose of paying yourselves as well as us?"

Because these men co-operated and put themselves in condition to buy the road, it does not seem to me that they were, therefore, acting in any fraudulent manner. They deprived these petitioners of none of their rights. They were at liberty

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to join the syndicate, as it was called; they were at liberty to bid; they were at liberty to come in and make themselves parties. They did nothing of the kind. Were these bond holders, who purchased the road, to be put into the condition of a single man, who owned \$12,000,000 out of \$15,000,000 of bonds, I can see no reason why they should not take steps to have the road sold, and buy the road as cheap as they could get it, provided they cheated or hindered nobody in the matter.

This branch of the subject was not necessary to be decided here, and the parties may take an appeal from Judge NELSON's decision. I only make these remarks for the consideration of counsel.

The present petition is overruled.

Foss and others v. THE FIRST NATIONAL BANK OF DENVER.

(District of Colorado. January, 1890.)

1. JURISDICTION — NATIONAL BANKS.— The federal courts have jurisdiction over all suits by and against national banks, irrespective of the subject matter.
2. SAME — SAME — PARTIES. — Joining merely nominal or formal parties has no effect either to confer or exclude the jurisdiction; but trustees, executors and the like, are not formal parties within the meaning of the rule, where in fact interested in the litigation. Accordingly, where two or three persons, claiming a certain fund which was in the custody of a national bank, brought their bill in equity against the bank and a third claimant, and the bank exhibited its cross bill, praying that the parties might interplead, this was held to confer jurisdiction, although but for such cross bill the jurisdiction was doubted.

In equity. Bill and cross bill. Motion to dismiss for want of jurisdiction.

L. C. Rockwell and J. Q. Charles, for motion.

Wagner, Dyer & Emmons and W. S. Decker, opposing.

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MCCRARY, Circuit Judge.—This controversy relates to a fund which, under a written agreement between Simeon H. Foss, Absalom V. Hunter and Charles R. Bissell, was deposited to their joint credit with the First National Bank of Denver. The money can be drawn from the bank only upon the joint check of said Foss, Hunter and Bissell, and a dispute having arisen between them as to their respective shares thereof, no joint check has been signed.

On the eighth of January, 1879, defendant Bissell gave notice in writing to the bank that he claimed seven-twelfths of the fund, and that until his claim was adjusted he objected to the payment of any part of the fund to the other claimants. On the sixth of March following, the plaintiffs in the original bill, Foss and Hunter, served a written notice on the bank, claiming to own nine-twelfths of said fund, and declaring that said Bissell was entitled to three-twelfths only, and they demanded of the bank payment of eight-twelfths of the amount on deposit, leaving in the hands of the bank one-twelfth, as in dispute between them and Bissell. It also appears, from an inspection of these notices, that Bissell claims four-twelfths of the fund in his own right, and three-twelfths as agent and attorney for one C. J. Reynolds, and that Foss and Hunter deny all claims on behalf of said Reynolds. The plaintiffs in the original bill, Foss and Hunter, instituted this proceeding in order to settle the controversy as to the proper division of the fund, and pray decree directing the payment to them of their alleged share, to wit: eight-twelfths thereof. Defendant Bissell answers, claiming, in his own right and as representing C. J. Reynolds, to be entitled to seven-twelfths.

The bank answers, among other things, that it has no interest in the fund, and is only holding it as a depository, and does not know to which of the claimants it ought of right to render and pay the same. Of the cross bill filed by the bank I will speak presently. The defendant Bissell moves to dismiss for want of jurisdiction. The motion is urged upon the ground that all the parties are shown by the bill to be citizens

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of the state of Colorado, and that there is no jurisdiction under the national bank act, because the First National Bank of Denver appears, by the record, to be only a nominal party, without interest in the litigation.

1. It may be regarded as settled that national banks may sue and be sued in the federal courts by virtue of the provisions of section 629 of the Revised Statutes of the United States, which provides as follows:

"Section 629 — *Jurisdiction*. The circuit courts shall have original jurisdiction as follows: * * * '*Tenth* — Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.' " *First Nat. B'k of Omaha v. County of Douglas*, 3 Dillon, 298; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383-395; *Kennedy v. Gibson et al.* 8 Wall. 498.

Under a similar provision of the charter of the United States Bank of 1816, a question was made as to the power of congress to confer jurisdiction upon a federal court in a case not necessarily involving the construction or the validity of a law of the United States, or of some provision of the constitution, or of a treaty. This question was raised upon the second section of the third article of the constitution, which limits the judicial power of the United States to "cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority," and it was claimed that a case against a bank of the United States was not necessarily a case arising under a law of the United States. But the supreme court, in the case of *Osborn v. United States Bank*, 9 Wheat. 738, in which an elaborate opinion was delivered by Chief Justice MARSHALL, held that the act of congress conferring jurisdiction upon the circuit courts in all suits by or against such banks, irrespective of the subject matter, was constitutional.

This ruling applies with full force to the construction of the above-quoted provision of the Revised Statutes.

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2. It seems to be well settled that the joining in a suit of merely nominal or formal parties can have no effect, either in conferring or excluding jurisdiction. *Browne v. Strode*, 5 Cranch, 303; *Wormley v. Wormley*, 8 Wheat., 421; *Wood et al. v. Davis*, 18 How. 467. Trustees and executors do not belong to this class. They are, although suing for others, the real prosecutors of the suit. They are parties to the contract. *McNutt v. Bland*, 2 How. 9, 10; *Knapp v. Railroad Co.* 20 Wall. 117. In the latter case, which was a suit by a trustee, the court said: "He is not a mere passive instrument in the litigation. On the contrary, he is active in prosecuting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. As the cause of action is vested in him, the court looks to his citizenship in determining the question of jurisdiction, and not to the residence of those persons who are beneficially interested in the subject matter of the litigation." *McNutt v. Bland* was a suit on the official bond of a sheriff executed to the governor of the state. The action was brought in the name of the governor of Mississippi, against a citizen of that state, but for the use of citizens of another state. The jurisdiction was upheld upon the ground that the governor was a nominal party only, the court observing that "in no just view of the constitution or law can he be considered a litigant party; both look to things, not names: to the actors in controversies and suits, and not to the mere forms or inactive instruments used in conducting them, in view of some positive law."

Upon the authority of these and other similar cases I conclude that, where jurisdiction is dependent upon the parties to the suit, we are to look to the real and not to the merely nominal or formal parties. Where suit is brought against a national bank, by virtue of the statute under consideration, it must appear that the bank is a real active party to the litigation in order to maintain the jurisdiction. If the case stood upon the original bill and answer I should entertain grave doubts as to jurisdiction. It could, in that case, be

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upheld, if at all, only upon the ground that the proceeding, if conducted to a termination, would result in a judgment against the bank.

3. But the bank itself has chosen, by its cross bill, to invoke the aid and protection of this court as a court of equity, and I will now consider whether it has, in this way, brought the controversy within the jurisdiction.

The circuit courts have jurisdiction of suits instituted by national banks in equity as well as at law; and the question to be determined is whether the cross bill in this case may be regarded as in itself constituting a suit within the meaning of the equity rules and practice prevailing in this court. The cross bill is filed by the bank against all the claimants of the fund in question, and it sets out the facts already referred to in this opinion. It also avers that plaintiff in the cross bill is a national bank, organized and existing under the national banking act approved June 3, 1864, and amendatory acts, doing business at Denver, Colorado, within this district. It sets forth the fact of the filing of the original bill in this case, and the substance of the allegations therein, as well as a statement of the conflicting claims and demands upon said fund, of Foss and Hunter on one side and Bissell on the other. Concerning the fund in dispute, the cross bill sets forth that "the same is now in the bank of your orator, which sum your orator is informed and believes is in dispute between the said Bissell on the one side, and the said Foss and Hunter upon the other; that each party demands the right to own said sum of money last above stated; that your orator claims no right, title or interest in or to the same, but is merely holding it as a depository or stakeholder, and does not know to which of the claimants he ought of right to render and pay the same. And your orator further represents and shows to the court, that it is under no liability to either said Foss and Hunter or said Bissell, beyond that which arises to the title to the money so deposited in its bank. Said Bissell on the one hand, and Foss and Hunter on the other, demand that your orator should pay

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such money over to them, but they refuse to join in a joint check or order in checking the same out; that your orator has doubts as to which of said parties really owns said money, and that it cannot safely pay or render it to one party without being liable for the same debt to the other," etc.

The prayer is that defendants may be required to interplead, and settle or adjust between themselves, their right or claim in or to the disputed fund, the bank declaring its readiness to pay in accordance with the decree of the court. It is well settled that a trustee or bailee who is sued, or in danger of being sued, by several claimants of the same property, may have relief by filing a bill to compel them, by the authority of a court of equity, to interplead and settle their dispute in one suit. This rule is based upon the ground that such a proceeding relieves the bailee or depository from being harassed by suits in which he has no interest; and it is especially applicable to a case "where two or more persons severally claim the same thing under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from conflicting claims of the parties." 2 Story's Eq. Jur. § 806. The proceeding may be instituted, not only to secure for the bailee or depository protection against being compelled to pay or deliver the thing claimed to both claimants, but also to relieve him from the vexation attending upon the suits which are or may be instituted against him. For a full discussion of the whole subject see 2 Story's Eq. Jur. §§ 801 to 813*b*, inclusive, and cases cited in notes.

The doctrine has been applied to the case of a bank having possession of funds claimed by adversary parties, which is this case. *The City Bank of New York v. Skelton*, 2 Blatchf. 14.

4. The remedy in such a case is, as will be seen from an

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examination of the foregoing authorities, by bill of interpleader, which is an original bill, filed by a person who claims no interest in the subject matter, in opposition to the person against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the plaintiff in the bill. Story's Eq. Pl. § 18. The remedy is here sought by means of a cross bill, filed in a case already commenced; but upon examining this pleading I find that it is in substance, and in everything but name, an original bill of interpleader, and I am of the opinion that for the purposes of this motion it may be regarded as an original suit brought by the bank, in the nature of a bill of interpleader, against the several claimants of the fund in controversy. It was filed before answering the original bill, and it contains all the substantial allegations of a bill of interpleader, including a prayer for process and for relief. Story's Eq. Pl. ch. 6. In form, the bill, considered as a bill of interpleader, may be slightly defective, but in substance it is sufficient, and in considering the question of jurisdiction we will look to the substance rather than to form. As the whole controversy is presented by the cross bill, and can be settled thereunder, I have no hesitation in holding that this court has jurisdiction, and the motion to dismiss is accordingly overruled.

STEVENS v. WILLIAMS *et al.*

(District of Colorado. July, 1879.)

1. MINING LAW — LODE OR LEDGE DEFINED. — A vein, lode or ledge, within the meaning of the act of congress, is a mineral body of rock within defined boundaries in the general mass of the mountain.
2. SAME — TOP OR APEX. — The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein, at its highest point, turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex.

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3. **SAME—FOLLOWING VEIN.**—Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein in its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal.

CHARGE by MILLER, *Circuit Justice*.—Gentlemen of the jury: After a very long and patient investigation of the case, with the aid which eminent counsel have been able to give to you and to the court, we approach a point when you and the court must act in the decision of the questions presented in the case. It is a satisfaction to me to state, if my experience is of any value, that I have very rarely seen as many witnesses, in so important a case as this, where they have testified so frankly, and where I have been so perfectly convinced of their integrity. * * * And as this is my first case upon important mining matters—a class of cases coming more rapidly into the courts than heretofore,—I hope that the miners will always deserve the character which I am happy to give them in this case, of being true and honest men in what they endeavor to state.

There are some things, gentlemen, of which I propose to disabuse your minds before entering upon the real merits of the case. A great deal has been said about the immense value of the interests at stake, and I think counsel on both sides have intimated to you that your verdict may settle rights of property to a very large amount outside of the case now in controversy. That is quite a mistake; your verdict settles nothing in the world but the matter in controversy between these parties. Even the opinion which the court delivers, that, perhaps, may hereafter be used in similar cases as settling principles, but for which you are not at all responsible, may be and probably will be revised by the highest court of the country, the supreme court of the United States. So that in

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delivering this opinion, my brother HALLETT and myself are not deciding principles finally which govern anybody's case, possibly not even this case. Therefore, do not be frightened; do not be alarmed; do not bring in any other verdict than what you would if this were a simple controversy between the owners of the Iron mine and the owners of the Grand View mine, for that is all there is in this case.

The plaintiff has asked certain instructions here which I have refused, in regard to the testimony, and I regret that they should have been introduced into his prayer for instructions, but I will rule upon them so that he can get the benefit of them if he desires. I am asked by him to state that the patent which he has received from the United States for the Iron mine is conclusive, that the sheet of mineral matter in question is a vein, within the meaning of the statute. I decline to give that instruction. Certainly, outside the vertical projection of the side lines of the plaintiff's patented ground, if the defendants can show that the mineral matter which is the subject of this controversy is not a vein they have the right to show it. Outside of the side lines of the plaintiff, projected perpendicularly downwards, defendants have the right, if they can, to show that the vein, or thing which is called a vein, is not a vein.

After disposing of that much of the preliminary matter, I now proceed to state to you what I understand to be the nature of this controversy. The plaintiff has a patent from the United States, which has been read to you, for a mine or lode of mineral matter, the superficial area of which is three hundred feet in one direction and fifteen hundred in another on the surface of the earth, as known and measured by the lines which have been pointed out to you and are called the end and side lines of the Iron mine. The act of congress on that subject says, that when such title or patent and such side and end lines cover the top or apex of a vein of mineral matter, if the party pursuing that vein in a downward direction, as he pursues it further, escapes from the perpendicular extension of

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these side lines, he may still follow that vein as long as he can find it, and so long as it is the same vein. That part of the statute is the source of this controversy. The plaintiff, acting upon that act of congress, has pursued what he calls his vein, has pursued it a very long distance, as shown by that incline on the map, which is the most continuous, outside of his side lines across the side lines of another claim and into the claim of the defendants. If it is a continuous vein of mineral matter, and if his side lines cover the apex or outcrop of that vein, and if those lines are extended in a proper direction across the shoot or course or strike of that vein matter, he has the right to pursue it. The defendants, commencing at another point on the surface of the earth and descending perpendicularly as shown on the map, have come to a point where their shaft intersects the incline which the plaintiff has made in the pursuit of his mineral, and the contest is for the mineral matter where these two shafts meet, so far as the defendants' claim covers, or may be supposed to cover it.

Now I state to you in the first place, if that is a vein of mineral matter, within the meaning of the act of congress, and in the second place, if the plaintiff's side lines are laid along the course or shoot of that vein, and inclose its top, apex or outcrop, and if the plaintiff in the pursuit of that vein into the bowels of the earth, pursued it downwards continuously, he is right in this controversy, and he should obtain your verdict.

The defendants say they are entitled to your verdict upon three principal grounds:

1. They say that the mass of mineral matter which is the subject of this controversy is not a vein, lode or ledge, within the meaning of the act of congress.
2. That what the plaintiff claims to be the apex, or top, or outcrop of this lode is no such thing, but is a mere elevation of the general position of this sheet of mineral matter, and from that point it continues on a westward dip, and, therefore,

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this is not an apex but merely a swell in the mineral matter. And,

3. That the plaintiff has not so located his side lines and end lines with reference to the strike or course of the mineral, as to entitle him to the benefit of that statute.

Now these are the three points to which your attention is to be directed, and about which I propose to lay down some matters of law which will govern you in the case. But before I proceed to give my own views in the matter, and because it will, perhaps, facilitate any exceptions that may be taken, I will read to you certain prayers for instructions asked by the defendants in this case, some of which I will give to you, others I will modify, and others I will refuse. The first one which I think is sound law, is as follows: "In addition to the evidence of the title furnished by the patent, the plaintiff must show by a preponderance of evidence that he is the owner of a body of mineral on his patented ground; that such mineral constitutes a vein of quartz or other rock in place" (and there I want to say that by rock in place I do not mean merely hard rock, merely quartz rock, but any combination of rock, broken up, mixed up with minerals and other things, is rock, within the meaning of the statute, because it does not say common quartz rock alone, but it says "that such mineral constitutes a vein of quartz or other rock in place"); "that being such a vein it penetrates the land in controversy, known as the Grand View claim" (if it is such a vein and runs under the surface of the earth, if it goes to the perpendicular lines of the Grand View claim; that is what is meant); "that the top or apex of the vein is within the surface lines of the Iron lode location, and where it enters the land in dispute it does so in a downward course departing from a perpendicular." Counsel have inserted here that at the respective points where it leaves the Iron mine location, and where it enters the land in dispute, it does so in a "downward course, and departing at both said points from a perpen-

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dicular." I have cut out so much of that as says "that at the respective points where it leaves the Iron mine location." I think if the general course of that vein is a departure from the horizontal, that it covers the case. With the exception of striking out that single point, "that at the respective points where it leaves the Iron mine location," I give that instruction.

Second. "And if these conditions are fulfilled it must also appear that the location of the Iron mine is laid upon the general course, or strike; that the vein mentioned departs from the plaintiff's location at a point on its general course within the patented side lines." That is correct. The long lines of the plaintiff's claim must be so laid, with regard to the general course or strike of the vein, that in pursuing it you pursue it to the end lines, or where it leaves the side lines within those end lines.

Third. "Although the area of ground within the patented lines of the plaintiff extends fifteen hundred feet in a northerly and southerly direction, by three hundred feet in width, plaintiff is only entitled to so much of the Iron lode along its general course as is embraced within his side lines; and if the body of mineral within the patent deflects on its general course, so as to cross the side lines, plaintiff has no right to go beyond such lines to follow it. If, therefore, the supposed vein of quartz or rock in place, departs from a perpendicular in its downward course, at any point on its course or strike outside of plaintiff's side lines, and then enters the land in controversy, plaintiff cannot by reason of this recover in this action." I refuse that for two reasons: if it means anything more than the language given in the previous instructions, I do not give it. In the second place, it is complex and confusing to the jury. I can hardly understand it myself, and therefore I presume you could not understand it better than I can.

The fourth one I refuse. "In addition to the things already mentioned as essential to the plaintiff to recover in this action,

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the vein of quartz or rock in place" must be "one which in its descent into the earth is substantially vertical in its direction"—that is, straight down,—“which on leaving the side lines of the plaintiff and entering the land in dispute, departs from a perpendicular and not from a horizontal direction.” I refuse that; if there is any departure from a horizontal direction in a downward course, it is sufficient.

The sixth one is: The “top” or “apex,” within the act of congress, is the highest end or termination of the vein, and this is so, even though at any intermediate point or points, where the vein is continuous, it rises higher than such highest end, it being essential to such “top” or “apex” that there be no vein continuing beyond it. I give that. It must be the end of the vein which approaches nearest to the surface, as I shall explain more fully in another part of the charge. That is the substantial meaning of it.

The next, number seven, is: “In order to constitute a vein of quartz or other rock in place which will entitle the plaintiff to follow it into the land of another, it is not enough that there be a seam or crevice between rock in place filled with mineral, but the mineral contained between the rock in place must be of “quartz or other rock.” I have explained already to you, the meaning of *other rock*, that it did not mean solid rock necessarily, but it means any rocky substance containing mineral matter—“and unless plaintiff has shown by a preponderance of evidence, the contents of the supposed vein to be of ‘quartz or other rock,’ he cannot recover, for under the act of congress under which plaintiff claims, all forms of deposit excepting veins of quartz in rock in place, are placers.” I give that instruction, but with the distinct understanding that all this substance between the porphyry and limestone, that has been explained to you, which contains mineral—I mean which contains ore,—is rock in place.

The eighth instruction, “although the jury believe from the evidence that the plaintiff is the owner of a vein of quartz or rock in place, yet if such vein on its course toward the land in

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dispute, be interrupted for a considerable distance, then it ceases to be a lode or vein so as to give the plaintiff the right to pursue it into the adjoining land, and in such case the plaintiff cannot recover." I refuse that instruction. In the first place the evidence is uncontradicted—at least so little contradicted I would not dare to put that to the jury—that that main incline has metallic ore in it from beginning to end, as far as it has been carried; and in the second place, the words "considerable distance," do not convey any accurate conception. In some cases a mile would be a "considerable distance," and in some cases, where a life depended on it, half an inch would be a considerable distance.

There is another matter asked by the counsel, which I think is too complex, and I refuse it upon other reasons. I shall, however, charge the jury upon the whole of that matter.

Now, gentlemen of the jury, as I make out the subject matters to be considered by you in this case, the first one of them for you to determine is, what is a vein, lode or ledge of mineral matter within the meaning of the statute, and in regard to that matter, I apprehend you will have no great difficulty in this case. The statute of the United States, in determining the terms on which its mineral lands shall be sold, used or occupied, has divided mineral lands, at least all that relate to precious metals, into two distinct classes: they are those which are called placer mines and those which are called veins, lodes or ledges of mineral matter in quartz or other rock in place.

Now I do not know that I can better define what is a vein, lode or ledge to you, than has already been done by my associate on the supreme bench, Brother FIELD, whose learning on that subject is equal, perhaps, to that of any judge of the United States courts, and whose diligence and precision are equal to his learning. Without going over all that he says about it, most of which was read to you by Mr. Symes, I adopt and instruct you that a "continuous bed of mineralized rock, lying within any other well-defined boundaries on the

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earth's surface and under it, would constitute a lode, and that the term is used in the acts of congress as applicable to any zone or bed of mineralized rock, lying within boundaries clearly separating it from the neighboring rock. It is any class of deposits of mineral matter coming from the same source, impressed with the same forms, and appearing to have been created by the same process." * * * I am also aided by my Brother HALLETT, whose experience is greater than mine in this matter, and who has also given the definition of the word, which I propose to read to you as the law: "In general, it may be said that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries in the general mass of the mountain;" and I do not know a better or more comprehensive definition than that. I say to you, further, gentlemen, that the thinness or thickness of the matter in particular places does not affect its being a vein or lode; nor does the fact that it is occasionally found in the general course of this vein or shoot, in pockets deeper down into the earth or higher up, affect its character as a vein, lode or ledge.

I say to you, further, that a total interruption of the ore matter, if the contact remains on each side, the limestone and porphyry are still preserved, and the vein of mineral matter is found within a short distance further on, pursuing that same contact, it is still a part of the same vein. In short, if there is a general and pervading continuance of this mineral matter with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as you can trace that until it breaks off totally and is interrupted for a very large distance, it is a vein of rock or mineral matter. Now I think you will have no difficulty in applying these definitions, since the evidence here is almost uncontradicted that there is such a sheet of matter as is spoken of. All the witnesses agree that there is a substratum of limestone and a super-stratum of porphyry; all agree, even defendants' witnesses, that they come to a point where that contact is so narrow that only a sheet of paper

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could be got into it, but still it has the well preserved distinction — the porphyry above, the lime below, and, although in some instances to the south, some to the north, and some occasional spots in the levels, it is stated by defendants' witnesses, that no more vein matter has been found, yet you must, I think, come to the conclusion that on the whole, and taking the course on which this matter is in contact from the line of the plaintiff's location to the line of the defendants' location; taking the course of that large incline shaft, driven by the plaintiff from where he first discovered it to where it meets the defendants', it is for you to say from the testimony, not for me to find for you. But I can see no reason why you should not say there is a continuous vein of mineral from the opening shaft, the plaintiff's shaft, to the point where it reaches the Williams shaft. If that is true—if you find that to be true, why, notwithstanding these casual interruptions in various directions, notwithstanding the widening, the narrowing, the deepening and the shallowness of the vein, notwithstanding it has, in some places, acknowledged diversions down into the ground, still, if the miner is able to pursue and has been able to pursue it in the vein, notwithstanding these interruptions, you are to call it a vein, and treat it as a vein within the meaning of the act of congress.

The next point is, that it is denied that there is a top or apex to this ledge or vein, and that if there is such a one it is not within the side lines of the plaintiff's patent. Perhaps upon that point the defendants have mainly rested their case. I think that you will agree with me, as all the counsel agree and all the witnesses agree substantially, conceding that there is a vein, that the top or the apex of a vein, within the meaning of the act of congress, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. The word "outcrop" has been used in connection with it, and in the true definition of the word outcrop, as it concerns a vein, is probably an essential part of the definition of its apex

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or top; but that does not mean the strict use of the word "out-crop." That would not, perhaps, imply the presentation of the mineral to the naked eye, on the surface of the earth, but it means that it comes so near to the surface of the earth that it is found easily by digging for it, or it is the point at which the vein is nearest to the surface of the earth; it means the nearest point at which it is found toward the surface of the earth. And where it ceases to continue in the direction of the surface, is the top or apex of that vein. It is said in this case that the point claimed to be the top or apex is not such, because at the points where plaintiff shows or attempts to prove an interruption of that vein, in its ascent towards the surface, and what he calls the beginning of it, the defendants say that is only a wave or roll in the general shoot of the metal, and that from that point it turns over and pursues its course downwards as a part of the same vein, in a westerly or southwesterly direction. It is proper I should say to you, if the defendants' hypothesis be true, if that point which the plaintiff calls the *highest point, the apex*, is merely a swell in the mineral matter, and that it turns over and goes on down in a declination to the west, that it is not a true apex within the statute. It does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of the mineral nearly horizontal.

Now, gentlemen, I have but one more matter, and really I do not know that there is much to be said about that. The defendants maintain that the lines — the side lines — of the plaintiff's claim are so located in reference to the shoot or strike of the vein which they claim to pursue, that he has no right to pursue it at the point where this controversy exists.

You must take all the evidence together, you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes, and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode so as to

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cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines vertically extended, as though they were his end lines; but if he happens to strike out diagonally as far as his side lines include the apex, so far he can pursue it laterally; if the vein projects beyond his side lines, then it is only a question as to the distance which he can include this vein within his side lines, which I don't see arises in this case at all; but that is for you to say.

Now, gentlemen, I have laid before you all that I think material for your judgment in this case. If you believe that that is the top or apex of the vein on which the plaintiff has laid his claim; if you believe that is a vein within the meaning of the act; if you believe that is a vein under the circumstances and definitions which I have given you; if you believe that in pursuing that vein to the east, or slightly to the northeast, the plaintiff has followed substantially a continuous sheet of ore, although with occasional interruptions, occasional narrowings, occasional enlargements and occasional pockets, yet if it is substantially the same vein and sheet of ore, and he has followed it and found the defendant in possession in the line of his openings, the law is with the plaintiff. If you do not believe all of these propositions are established, the verdict will be for the defendants.

FIRST NATIONAL BANK OF CHICAGO v. RENO COUNTY BANK.

(District of Kansas. August, 1890.)

1. **BILLS OF EXCHANGE — RESTRICTIVE INDORSEMENTS.** — Two bills of exchange, belonging to the plaintiff at Chicago, were indorsed for collection to a bank at Atchison, Kansas, and by said Atchison bank to a bank at Kansas City, Missouri, and by the latter to defendant, a bank at Hutchinson, Kansas. *Held*, that they remain the property of plaintiff, all the indorsements being restrictive.

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2. ASSIGNMENT "ON ACCOUNT OF" INDORSER, OR "FOR COLLECTION."—An indorsement on a bill of exchange directing the drawee to pay to another "on account of" the indorser, or "for collection," is a restrictive indorsement, the effect of which is to restrict the further negotiability of the bill, and to give notice that the indorser does not thereby give title to the bill, or to its proceeds when collected.
3. PRIVACY — RIGHT OF ACTION FOR PROCEEDS.—Although there may be no privity between the owner of the bill and the last indorsee, yet, if the latter collects the bill, he is bound to pay the proceeds to the owner, and the latter may recover in *assumpsit*, on the ground that the defendant has property in his possession which belongs to the plaintiff, and refuses to pay the same over.

Motion for new trial.

Brown & Wright and *Clough & Wheat*, for plaintiff.

Gage & Ladd, for defendant.

MCCRAEY, *Circuit Judge*.—This cause was tried before the court at the November term, 1879, and resulted in a judgment for the defendant. At the request of Judge FOSTER, before whom it was tried, the motion for a new trial has been argued before the full bench. The facts are as follows:

1. The plaintiff, which is a bank in Chicago, in July, 1878, became the owner, by assignment to it, of two negotiable bank checks drawn on the defendant, which is a bank at Hutchinson, Kansas.

2. Plaintiff transmitted said checks to W. Hetherington & Co., of Atchison, Kansas, indorsing each of them as follows:

"Pay to the order of W. Hetherington & Co., Atchison, account of First National Bank, Chicago.

"L. J. GAGE, Cashier."

3. The said Hetherington & Co., forwarded said check to the Mastin Bank, at Kansas City, Mo., indorsed as follows:

"Pay to the order of Mastin Bank. For collection. Account of Hetherington, Exchange Bank, Atchison, Kansas."

By letter enclosing said checks the Mastin Bank was requested to receive the same "for collection and credit."

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4. The Mastin Bank sent said checks by mail to the defendant, with a letter stating the same to be for collection and credit, and the defendant, before 9 o'clock A. M. of August, 3, credited the amount of said checks to the Mastin Bank, cancelled, and placed them on the "sticker," and on the same day charged the amount thereof to the drawers thereof.

5. The Mastin Bank did business as a bank on August 2, but failed, and did not open its doors on August 3.

6. The parties through whose hands said checks passed after they were indorsed to plaintiff, were all bankers, and doing business as collecting agents.

7. When plaintiff sent the checks to Hetherington & Co. they charged the amount thereof to them, and, upon receipt of the checks, Hetherington & Co. credited the amount thereof to plaintiff.

8. In like manner Hetherington & Co., upon transmitting said checks to the Mastin Bank, charged the amount thereof to the latter, and, upon receiving the checks on the first of August, the Mastin Bank credited the amount of them to Hetherington & Co.

9. The Mastin Bank, on the third of August, made an assignment of all its effects to Kersey Coats, as assignee, for the benefit of its creditors.

10. The Mastin Bank was largely indebted to defendant when it failed, and the defendant, *having collected the checks*, applied the amount upon said indebtedness.

11. The plaintiff and Hetherington & Co. were, and for a long time had been, correspondents, as had been Hetherington & Co. and the Mastin Bank, and the Mastin Bank and defendant. The transactions, charges and credits were in the usual course of business.

12. In March, 1879, the plaintiff credited back on its books, to Hetherington & Co., the amount of these checks.

13. Hetherington & Co. proved their claim against the estate of said Mastin Bank, including the amount of said checks, which claim was allowed in January, 1879, and they have since

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received from the assignee a dividend of twelve per cent. Such proof was not made at its suggestion, or with the knowledge of plaintiff.

14. Hutchinson, where defendant's bank is located, is more than two hundred miles from Kansas City, where the Mastin Bank was located.

Upon these facts the question is whether defendant, when it collected the money on the checks, became the debtor of the plaintiff or of the Mastin Bank. It is insisted on the part of plaintiff that the checks were the property of plaintiff, and that due notice of its ownership was communicated to the defendant by the restrictive indorsements thereon; and that the defendant has shown no right to retain their proceeds, or to apply the same on its claim against the Mastin Bank.

On the part of defendant it is insisted that plaintiff cannot recover because there is no privity between plaintiff and defendant. In the case of *Bank of Metropolis v. New England Bank*, 1 How. 234, it was held that if negotiable paper, not at maturity, be indorsed and delivered to a bank merely for collection, and be sent by such bank to another bank for collection, *without notice that it does not belong to the former*, the latter may retain the paper and its proceeds to satisfy a claim for a general balance against the former, *if that balance has been allowed to arise and remain on the faith of receiving payment from such collections*, pursuant to a long usage between the two banks. In that case it appeared that the paper in question was indorsed by the New England Bank, of Boston, to the Commonwealth Bank, of Boston, for collection merely, and the latter bank sent it for collection to the Bank of the Metropolis, in the city of Washington. The indorsement to the Commonwealth Bank did not show that the title was retained by the New England Bank. The Bank of the Metropolis having collected the paper and applied the proceeds to the payment of a claim held by it against the Commonwealth Bank, which, in the meantime, had become insolvent, sought to show, in justification, that for a series of years it

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had been in the habit of receiving such paper from the Commonwealth Bank, which was always treated as the property of that bank, and credited to it in its account current, and that the paper in question was received in that way, in the ordinary course of business, without any notification that any other party had any interest therein.

The court said: "It is evident that a loss must be sustained, either by the plaintiff or defendant in error, by the failure of the Commonwealth Bank. We see no good ground for maintaining that there is any superior equity on the side of the New England Bank. It contributed to give the corporation, which has proved insolvent, credit with the plaintiff in error, by the notes and bills which it placed in its hands to be sent to Washington for collection, *indorsed in such a form as to make them prima facie the property of the Commonwealth Bank, and enable it to deal with them as if it were the real owner.*" It will be seen that the case was decided upon the ground that the paper was indorsed so as to show, *prima facie*, a perfect title in the indorsee, thus enabling the latter to use it as its own, and to get credit on the faith of absolute ownership. It is clear that had the indorsement been restricted in its character, so as to show the continued ownership of the New England Bank, the result would have been different. Of the effect of restrictive indorsements I shall speak hereafter.

In the case of *Wilson & Co. v. Smith*, 3 How. 763, it was held that if the owner of a bill send it to an agent not residing at the place where it is payable, for collection, the agent has an implied authority to employ a sub-agent at that place, and, if the sub-agent receive the contents, the owner can sue him for money had and received, although the sub-agent had no notice, when he collected the money, that the agent was not the owner.

And it was also held that in such a case the sub-agent cannot retain part of the proceeds on account of a debt of the agent, *unless he has given credit on the faith that the agent owned the bill.* It is admitted that this case is decisive of the

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case at bar, unless it has been overruled by the recent case of *Hoover, Assignee, v. Wise et al.* 91 U. S. 308, which must now be considered. That was a suit in bankruptcy. Wise & Greenbaum owned a money demand, which they delivered for collection to a collection agency in Nebraska. That agency transmitted the claim to an attorney, who, *knowing the insolvency of the debtor*, persuaded him to confess judgment. It was held that the attorney was the agent of the collection agency which employed him, and not of the creditors, and that therefore his knowledge of the insolvency of the debtor was not chargeable to the creditors. The case undoubtedly holds that there is, in such cases, no privity between the last agent and the owner of the paper, and, therefore, if it be necessary for plaintiff, in the present case, to establish such privity between it and the defendant, this action must fail. Of course it was necessary, in the case of *Hoover v. Wise*, to show such privity, since that is the very foundation of the doctrine invoked in that case, that notice to the agent is notice to the principal; but in this case we are to consider whether the plaintiff's right to recover is not made out by showing that the bills collected by defendant were plaintiff's property, and that defendant had, in the restrictive indorsements on the paper itself, notice of plaintiff's ownership. That the bills were the property of plaintiff cannot be questioned. There is no pretense that it sold them to Hetherington & Co., or ever transferred any interest in them, or control over them, except the right to collect them for plaintiff's use and benefit. Is it not equally clear that defendant had notice of plaintiff's ownership? The indorsement by which plaintiff transferred the paper is in these words:

"July 29, 1878. Pay to the order of W. Hetherington & Co., Atchison, account of First National Bank, Chicago.

"L. J. GAGE, Cashier."

This was clearly a restrictive indorsement, the effect of which was to restrict the further negotiability of the bills, and to give notice to the defendant that the plaintiff did not

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thereby give title to them, or to their proceeds, when collected. 1 Daniel on Negotiable Instruments, § 698, and cases cited. Such an indorsement "shows plainly that the indorser does not mean to part with the absolute property in the bill, and is, therefore, barely authority to receive the money upon it." Edwards on Bills and Notes, § 277; *Leavitt v. Putnam*, 3 N. Y. 494. "In every such case, therefore, although the bill may be negotiated by the indorsee, yet every subsequent holder must receive the money subject to the original designated appropriation thereof, and, if he voluntarily assents to or aids in any other appropriation, it will be a wrongful conversion thereof, for which he will be responsible." Story on Prom. Notes, § 143, and cases cited. Upon these principles, which are clearly recognized in *Bank of Metropolis v. New England Bank*, and in *Wilson v. Smith*, *supra*, the plaintiff in this case is entitled to recover, unless a different doctrine is established by *Hoover v. Wise*, already referred to. In that case, as already seen, the only point decided was that the attorney who collected the debt for the collection agency "was not the agent of Wise & Greenbaum, the New York creditors, in such a sense that his knowledge of the bankrupt condition of Openheimer is chargeable to them." But suppose the attorney in that case, knowing that Wise & Greenbaum were the owners of the paper, had collected the money, and had refused to pay it over, assuming the right to apply it on a claim of his own against the collection agency, would it follow from this ruling that Wise & Greenbaum would have failed in a suit to recover it?

That the court did not intend to overrule its previous decisions, above referred to, is, I think, clear from the language employed on page 314, as follows: "Nor do we think that any great difficulty arises from the case of *Wilson v. Smith*, 3 How. 763-70. That decision is based upon the case of *Commonwealth Bank v. Bank of New England*, 1 How. 234, which is the only case referred to in the opinion, and in which case the question was not raised. The question there was not

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one of privity, but of the right to retain under the circumstances stated." Precisely so, in this case, the question is as to the right of the defendant to retain the money under the circumstances. Inasmuch as it was plaintiff's money, and defendant had notice of that fact, I think he cannot retain it. Even without such knowledge defendant would be liable. I fully approve the doctrine announced by the supreme court of Massachusetts in *Hall v. Marston*, 17 Mass. 574-79, as follows: "Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to this action (*assumpsit*), although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has a legal or equitable ground for retaining it, the law creates the privity and the promise." This doctrine is not in conflict with the decision of the supreme court in *Hoover v. Wise*. The defendant's claim, that it has the right to apply the proceeds of the checks collected by it to the liquidation of its claim against the Mastin Bank, is entirely without merit. There is not a shadow of ground for holding that the defendant believed the paper belonged to the Mastin Bank. The indorsement to that bank declares in plain words that it was "for collection," so that the defendant was definitely informed that the Mastin Bank did not own the check.

It appears that the plaintiff charged the checks to Hetherington & Co. at the time of sending them to that firm for collection; but this seems to have been in accordance with a custom prevailing in such transactions. The paper sent to an agent for collection is charged to the agent, and credit is given when it is returned uncollected, or, in case of collection, when the proceeds are remitted. This, however, does not affect the title to the paper or its proceeds; that depends upon the question whether the paper is *sold* or not, except in the case of an assignment on its face purporting to be an absolute sale or transfer, upon the faith of which an innocent purchaser buys from the assignee or advances money to him. It results from

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these views that a new trial must be granted, and that, upon the facts found, there must be judgment for plaintiff.

FOSTER, *District Judge, dissenting*.—I cannot concur with the circuit judge as to the law of this case. My views are fully presented in an opinion written on the former trial of the case, and I need but add a few lines more. It will be seen I then based my decision on the doctrine established by the supreme court in the case of *Hoover, Assignee, v. Wise*, 91 U. S. 308-13, and upon that case I now stand.

While it is true the facts in that case are not altogether similar to the facts here, yet that case did fairly present the question as to privity of action between the principal and an agent appointed by his agent, and it was decided that no such privity existed.

On page 311 the court say: "Without attempting to harmonize or to classify the conflicting authorities, we think the case before us falls within a particular range of decisions in which the preponderance is undoubted. Among these are the following: *Reeves & Co. v. State Bank of Ohio*, 8 Ohio St. 465; *Mackersy v. Ramsays*, 9 Clark & Fin. 710-818; *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Allen v. Merchants' Bank*, 22 Wend. 215; *Com. Bank v. Union Bank*, 11 N. Y. 203."

It will be seen, from the opinion itself, that the cases which are cited approvingly by the supreme court establish the doctrine that a person or bank employed by a principal to make a collection cannot appoint another person or bank to transact the business, and make the latter the sub-agent of the principal. The court then says: "These cases show that where a bank, as a collection agency, receives a note for the purposes of collection, that its position is that of an *independent contractor*, and that the instruments employed by such bank in the business contemplated are its agents and not the sub-agents of the owner of the note. * * * There are, doubtless, cases to be found holding to the contrary of these views,

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but the principle they decide is nevertheless well established. Cases, no doubt, may also be found where actions have been sustained by the creditor against the last agent, or where he is charged with his acts, in which the point before us was not raised or brought to the notice of the court. Such cases are not authority on the point. Nor do we think that any great difficulty arises from the case of *Wilson v. Smith*, 3 How. 763-70. That decision is based upon the case of *Commonwealth Bank v. Bank of New England*, 1 How. 234, which is the only case referred to in the opinion, and in which case the question was not raised."

If this language does not overrule the doctrine enunciated in *Wilson v. Smith*, the principle this case clearly establishes, and the long array of cases cited with approbation, and which cannot be reconciled with *Wilson v. Smith*, it seems to me must be held to overthrow that case. That I am not alone in this construction of the *Hoover v. Wise Case*, I refer to the case of *Hyde v. First Nat. Bank*, 7 Biss. 156, and *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, decided by the supreme court of Indiana, November term, 1878, both of which cases rest upon this construction of the *Hoover v. Wise Case*. In these cases the several indorsements were restrictive indorsements, showing that the paper passed through several banks for collection, as in the case at bar, and in the Indiana case the defendant bank had notice of the failure of its correspondent, the Cook County Bank, before collecting and crediting the money. In these cases the *Hoover v. Wise Case* is cited as establishing the doctrine that no privity of action exists between the first creditor and the last collecting agent. In other words, a collecting agent cannot appoint sub-agents for the first creditor. The bank from which the defendant received the paper is its principal, and to which it is alone answerable, and by its principal in this case it was ordered to collect for, and credit to the account of, the Mastin Bank. It obeyed that order, and that too before it knew of the failure of the Mastin Bank. It will be seen by the

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plaintiff's amended petition in this case, that it sues the Reno County Bank as its agent, placing its right of action on the ground that the Reno County Bank collected the money, not for the Mastin County Bank, but for the Chicago bank. Indeed, it could not place its right of action on any other ground, for no one would contend that it could be sued as the drawee of the paper.

I am aware there is a direct conflict on this question among the state cases, but what I hold is that the *Hoover v. Wise Case*, and the decisions it cites and approves, clearly establishes the doctrine that I contend for, and the last decision of the supreme court relieves me from any attempt to reconcile these conflicting decisions of the state courts.

GERMAN SAVINGS INSTITUTION v. CARL A. G. ADAE *et al.*

(*Eastern District of Missouri.* March, 1880.)

1. **BANK CHECK — RIGHT OF ACTION BY HOLDER.**—The holder of a check drawn on a bank cannot sue the bank for refusing payment, in the absence of proof that it was accepted or charged by the bank against the drawer.
2. **BILL OF INTERPLEADER.**—But where a bank holds a fund, to which claim is made by several parties, and where such bank, by bill of interpleader, asks a court of equity to determine the disposition of such fund as between the adversary claimants, the court will consider the equities as they exist between such claimants, and in such a case the rule that protects a bank from being harassed by suits by check holders has no application.
3. **MONEY COLLECTED BY AN AGENT MAY BE RECOVERED BY OWNER — INSOLVENCY OF AGENT.**—Where a bank in Cincinnati collected a note belonging to Newman & Co., and executed their check to that firm in payment of the proceeds of such collection, and before presentation of the check for payment the Cincinnati bank became insolvent and made a general assignment of all their property for the benefit of their creditors, *held*, that as between the check holders and the assignees, the former had the better right in equity.

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In equity.

Noble & Orrick, for complainants.

Mr. Harbison, for respondents.

MCCRARY, *Circuit Judge*.—This case is submitted upon an agreed statement of facts, from which it appears:

First. That on the sixteenth day of December, 1878, the firm of C. F. Adae & Co., bankers, Cincinnati, Ohio, being indebted to their correspondents, H. L. Newman & Co., at East St. Louis, Illinois, made and forwarded their certain bill of exchange (or check) of that date, on the German Savings Institution, a bank in St. Louis, for \$1,072, to the order of said H. L. Newman & Co., the same being proceeds of a collection theretofore made by said Adae & Co. in the ordinary course of business between them and the said H. L. Newman & Co.

Second. The said bill of exchange, received by said Newman & Co. on the nineteenth day of December, 1878, and about noon of that day, was presented at the banking house of said German Savings Institution for payment, which was refused.

Third. On the eighteenth day of December, 1878, C. F. Adae & Co. became insolvent, and on that day in Cincinnati, Ohio, made an assignment in writing of all their property to Augustus Bennett and Phillip Henry Hartman, in trust for the benefit of their creditors, which assignment and trust was on the same day accepted by said assignees.

Fourth. Upon making said bill of exchange, December 16 aforesaid, Adae & Co. charged themselves with the amount thereof on their general account with the German Savings Institution.

Fifth. On December 16, the amount on deposit with said German Savings Institution to the credit of Adae & Co. was more than the sum of said bill of exchange, and on December 18, at the time of said assignment to Bennett & Hartman, the balance on deposit as owing from it to, and the property of, said Adae & Co., on said general account was \$4,637.25.

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Sixth. Notice of the assignment to Bennett & Hartman was received by the German Savings Institution on the nineteenth day of December, before the presentation for payment of said bill, and by reason thereof, payment was refused.

The German Savings Institution, by bill of interpleader, asks the direction of this court as to the proper disposition of said fund. Bennett & Hartman, as assignees, claim the entire fund under the assignment from Adae & Co. to them. Newman & Co. claim a portion thereof under the bill of exchange executed to them by said Adae & Co., on the sixteenth day of December, for \$1,072.

The controversy is thus seen to involve the question whether the execution and delivery of the bill of exchange for \$1,072 was in equity, in view of the facts above recited, an assignment *pro tanto* of the fund in question.

It has been frequently decided that the holder of a check drawn on a bank cannot sue the bank for refusing payment of it, in the absence of proof that it was accepted by the bank or charged against the drawer. *Bank of Republic v. Millward*, 10 Wall. 152; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Thomas v. Riggs*, 5 Wall. 663; *Rosenthal v. Mastin Bank et al.* 21 Albany Law Journal, 28, and cases cited.

If, therefore, this were an action by the check holder against the bank upon the check, there could be no recovery. But such is not the case. This is a bill of interpleader in equity, by which the plaintiff, a bank, holding the fund in question, declares its readiness and willingness to pay as the court may order, and the controversy is as to the equities of the other parties, who are adversary claimants of the fund. The rule which protects a bank from being harassed by suits brought by check holders, has no application to a case of this character. We are at liberty, therefore, to inquire which of the claimants here has the better right in equity to the fund in question. There are undoubtedly numerous respectable authorities which sustain the doctrine that the execution of a check in the ordinary form, not describing any particular fund, does not

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operate as an assignment equitable or otherwise of funds of the drawer in the hands of the drawee. *Attorney General v. Insurance Co.*, 71 N. Y. 325, and cases there cited; *Randolph & Co. v. Canby, Assignee*, 2 National Bankruptcy Reg., 296.

But, on the contrary, it was held by this court in *Walker, Assignee, v. Siegel et al.* 2 Central Law Journal, 508, that the rule thus broadly stated seems to apply only to cases at law, and that "such an order, so soon as notice is given to the drawee, works an assignment in equity," and this view is well sustained by authority. *Roberts v. Austin, Corbin & Co.*, 26 Iowa, 315; *Forgarties v. State Bank*, 12 Rich. L. R. (S. C.) 518; *Mann v. Burch et al.* 25 Ill. 35; Daniels on Negotiable Instruments, vol. 1, p. 20, sec. 23; Willard's Equity Jurisprudence, Potter's edition, p. 464.

There is certainly no good ground for holding that a check or draft drawn upon a fund in bank is not an equitable assignment as between the drawer and payee, and in a case where there is no controversy as to the rights of the bank or drawee. It does not lie in the mouth of the drawer or of his assignee to say that such an instrument is not an equitable assignment. If it were conceded that, as a general rule, a check drawn upon a part of a fund in bank will not of itself operate as an assignment *pro tanto*, it is very clear to my mind that this is a case which a court of equity might well regard as an exception to any such general rule. As already suggested, the holder of the fund has come voluntarily into a court of equity, bringing the fund with him, and, disclaiming all interest in it, asks the court to dispose of it, as between the check holder and the assignee, according to equity. It is a case, too, in which it appears that, in equity, the fund was the property of Newman & Co. before the check was executed, being the proceeds of a collection made for them by Adae & Co. As between the parties who are now claiming this fund, a court of equity would have decreed the payment of it to Newman & Co., on the ground that Adae & Co. held it for them as the proceeds of a collection made as

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their agents, and therefore proceeds of their property. *Superintendent, etc., v. Heath*, 2 McCartie (N. J.), 22; *Overseers of the Poor v. Bank of Virginia*, 2 Gratt. 544.

It is well settled that the principal may follow his property into the hands of his agent or factor and recover it or its proceeds from him. *Veil & Petray v. The Adm'r of Mitchell*, 4 Wash. C. C. 105; *Bank v. King*, 57 Pa. St. 202; *Beech v. Forsyth*, 14 Bush, 399; *Cook v. Tallis*, 18 Wall. 332.

An assignee for general creditors can assert no claim that was not good in the hands of the assignor. *Roberts v. Austin, Corbin & Co.*, 26 Iowa, 315; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Clark v. Flint*, 22 Pick. 231; Burrill on Assignments, 483, 484, and authorities cited.

If there had been no assignment, and this were a controversy between Adae & Co. and Newman & Co., it would, I apprehend, hardly be contended that the right of the latter to a decree for the money could be questioned. Such a decree would only give them their own — the proceeds of their property, to wit, certain choses in action left with their agent, Adae & Co., for collection. As the assignees can assert no claim as purchasers, and have no equities which did not belong to the assignors, I am clearly of the opinion that the defendants, Newman & Co., are entitled to a decree for the amount of the face of their bill of exchange, to wit, \$1,072. The balance of the fund, after payment of costs, should go to the assignees. Decree accordingly.

JOHN M. O'NEILL v. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(District of Iowa. May, 1881.)

NEGLECTANCE — WHEN A QUESTION OF LAW AND WHEN ONE OF FACT. —

Where the facts are undisputed, the court may determine the question of negligence as a question of law, unless it appears that the facts are such that different minds might honestly draw different conclusions therefrom, in which case the question of negligence is for the jury.

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Motion for new trial.

W. A. Foster and John J. Mullaney, for plaintiff.

Hubbard & Clark, for defendant.

This suit was brought by plaintiff to recover damages on account of personal injuries caused, as alleged, by the negligence of the servants of the defendant.

The plaintiff was in the employ of the defendant as a car carpenter, and was directed in the course of such employment to repair a car which was standing upon one of the numerous tracks in the defendant's yard at Clinton, Iowa. He was directed to place certain lamp brackets upon said car, and in order to do so it was necessary for him to place a ladder against the car and to stand on the same while doing the work. While engaged in this duty, standing upon the ladder, a locomotive came in upon the track, and collided with the line of cars upon which plaintiff was at work, with such force as to throw him to the ground and injure him. The locomotive was in charge of an engineer and was attended by a fireman named Riggs and by a switchman. The fireman, Riggs, saw plaintiff in his perilous position in ample time to inform the engineer of his peril, but gave no notice and made no effort to stop the engine, or prevent the accident, except as shown in the tenth instruction to the jury hereinafter quoted. The case was tried before a jury, and there was a verdict for plaintiff. The motion for new trial is urged upon the ground that the court erred in charging the jury. The tenth instruction given to the jury is as follows:

"10. The evidence tends to show that the fireman, Riggs, who was with the approaching engine, could see plaintiff at work on the car, and that he did see him for some distance and in ample time to have informed the engineer; that he gave no alarm until the engine was within about one car length of the standing cars, and that he then called out 'whoa' to the engineer, who reversed his engine and nearly stopped the train,

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when the switchman, who did not see plaintiff, signaled the engineer to move on, when he again put on steam and moved up against the standing car, thus causing the injury. If you find these facts, the court instructs you that it was the duty of the fireman to notify the engineer that there was a man on the side of the car and in danger, and to give such notice in time to enable the engineer to avoid the collision; and if so notified it would have been the duty of the engineer to disregard the signal of the switchman to move on. In such a case he would be bound to presume that the signal had been given in ignorance of the danger, and he would be bound to act upon his knowledge of the danger, or upon any information he had received from the fireman, or from any other source, that there was a man in danger."

McCREARY, *Circuit Judge*.—I am inclined to the opinion that the tenth instruction given to the jury was erroneous, in that it did not leave it for the jury to say whether, under the circumstances, it was the duty of the fireman (Riggs) to have given to the engineer more definite and explicit warning concerning the plaintiff's peril. It is doubtful whether the circumstances of this case bring it within the rule that, the facts being established, the court may determine the question of negligence as a question of law. It probably belongs to that other class in which, although the facts be undisputed, different minds might honestly draw different conclusions therefrom; and if so, the question is for the jury. As the verdict is for less than \$5,000, and therefore a judgment rendered thereon could not be reviewed upon writ of error by the supreme court, I am constrained to resolve my doubts in favor of a new trial. The motion is sustained. *R. R. Co. v. McElwee*, 67 Pa. St. 315; *R. R. Co. v. Stout*, 17 Wall. 659; *R. R. Co. v. Van Steinberg*, 17 Mich. 99; *Gillespie v. City*, 54 N. Y. 468; *City v. Hildebrand*, 61 Ill. 155.

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SEAMANS v. THE NORTHWESTERN MUTUAL LIFE INSURANCE CO.

(District of Minnesota. August, 1880.)

1. LIFE INSURANCE—FORFEITURE—NEW AGENT.—A life insurance policy, containing a provision that the same should “cease and determine” if the premium should not be paid when due, is not forfeited by the failure to pay such premium on the day it is due, where the company neglected to inform the assured of a change in the agent authorized to receive the same after they had adopted a rule to give such notice in all cases, and the assured tendered the premium in due season to the former agent of the company, and was unable to find the new agent after reasonable inquiry.
2. SAME—SAME—REASONABLE TIME.—In such case the assured was entitled to a reasonable time before a forfeiture could be declared.
3. SAME—SAME—SAME.—The failure to pay such premium for sixty days after it was due was not, under such circumstances, an unreasonable time, where the company had waived the time of payment in the previous year, and it did not appear at what time, if ever, the assured was informed of the place of payment.

Charles J. Bartleson, for plaintiff.

Geo. L. & Charles E. Otis, for defendant.

MCCRAE, Circuit Judge.—This is an action upon a policy of insurance upon the life of one Albert P. Seamans, dated April 24, 1874, for \$1,000.

At the December term, 1879, there was a trial by jury and a special verdict, upon which judgment was rendered for the plaintiff for the sum of \$6.09 only, that being a dividend due the insured at the time of his death. The court held that the plaintiff could not recover on the policy because the same had been forfeited by the non-payment of the premium which matured April 24, 1877. The policy provides that if the premiums shall not be paid when due the policy “shall cease and determine.”

A motion for a new trial was made by the plaintiff upon the ground that the judgment was not warranted by the evidence, and was contrary to law, and also on the ground of

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newly discovered evidence. The court, while doubting the sufficiency of the newly discovered evidence to change the result, sustained the motion and granted a new trial, with a view especially to a further consideration of certain questions of law arising in the case. The case is now submitted to the court (the parties having waived a jury) upon the special verdict and the newly discovered evidence subsequently taken. It is conceded that the premium which became due on the fourteenth of April, 1877, was not in fact paid, and that unless plaintiff has shown a waiver of payment, or that the non-payment resulted from the fault of defendant, the policy sued on is forfeited. The facts relied upon by plaintiff to excuse the non-payment of this premium, as they appear from the special verdict and the testimony since taken, are as follows:

First. The premium due April 14, 1876, was paid without objection after maturity, as hereinafter stated. With this exception, all the premiums were paid as they matured prior to April, 1877.

The defendant's agents always notified assured in advance of the time when the premium would become due, and in said notice stated the amount of cash dividend which came due to the assured at the maturity of the premium.

Second. The assured, having moved to Minneapolis, was informed in 1876, before the premium was due, that he could pay the same at the Hennepin County Savings Bank, which he did on the fourteenth day of April, 1876, nearly one month after the same was due, which payment was received by the agent of defendant without objection.

Third. The Hennepin County Savings Bank, early in March, 1877, ceased to be the defendant's agent to collect said premiums, and no notice was given the assured of that fact, or that any other agent had been appointed.

Fourth. In March, 1877, the defendant notified the assured that the premium on the policy would fall due April 24, 1877, and that a cash dividend of \$6.09 would be due him at that time, which he could apply on the premium, and after deduct-

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ing this amount pay the balance; but no notice was given the assured of any agent to whom the premium could be paid in Minneapolis, and from whom a renewal receipt could be obtained. The notice did, however, require payment to be made "at the office of the agent of the company in Minneapolis, Minnesota."

Fifth. That the First National Bank of Minneapolis immediately succeeded to the agency of the Hennepin County Savings Bank for the collection of premiums for the defendant company, and was authorized to collect the premium due April 24, 1877, and was the only agent at that place. The plaintiff had no actual notice of the agency of said bank. The defendant had a state agent at St. Paul.

Sixth. That plaintiff and insured were informed by William B. Mason, agent of defendant at Minneapolis, shortly before the premium of 1876 became due, that it was not material that the same should be paid when due, but that it might be paid at any time within several months thereafter without prejudice to their rights.

Seventh. Silas A. Seamans, father of the assured, testifies that, at the request of the assured, he went to Minneapolis to pay the premium due April 24, 1877. He cannot fix the exact date, but says that it was not after the maturity of the premium. He went to the Hennepin County Savings Bank, where payment had been made the year before, and offered to pay the amount, but was informed that that was not the place to pay it, and that he would probably have to go to St. Paul. Although he made inquiry of several persons besides the bank officers, with whom he conversed, he failed to find the agency in Minneapolis, and was not informed that the First National Bank of Minneapolis was the agent.

Eighth. The assured was killed June 23, 1877, by a boiler explosion on Lake Minnetonka, Minnesota, and the premium due April 24, 1877, was not paid or tendered either before or after his death.

Upon these facts should the court declare and enforce a for-

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feiture of the policy on account of the non-payment of the dividend due April 24, 1877?

In *Insurance Co. v. Eggleston*, 96 U. S. 572, Mr. Justice BRADLEY, in delivering the opinion of the supreme court, said:

“We have recently, in the case of *Insurance Co. v. Norton* (*supra*, 234), shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, although it might be claimed under the express letter of the contract.” And it was, accordingly, in that case held that where an insurance company had been in the habit of notifying the assured of the time when and place where premiums were to be paid, he had reasonable cause to expect and rely on receiving such notice, and that the company was estopped from setting up that the policy was forfeited by the non-payment of a premium of which no such notice was given. In the present case it appears that in 1876 the company notified the assured that the Hennepin County Savings Bank, at Minneapolis, was its agent, to whom premiums should be paid. In March, 1877, the defendant appointed a new agent at Minneapolis, and when notices were, in that month, sent out to policy holders, the company adopted a rule to send a circular with each notice, informing the assured of the place where and the agent to whom payment should be made. The jury find that this circular was not sent to Seamans. He did not, therefore, know of the change of the agency, and naturally supposed he was to pay to the party to whom he had paid the year before. He sent his money in due time to that party. He did not send it to St. Paul, at which place he was informed there was an agent,

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because he had been notified that he must pay to the agent at Minneapolis. That the company understood it to be their duty to inform him of the change of the agency, is clear from the fact that they adopted a rule to do this in all cases, and omitted it in his case by oversight.

Under the circumstances, I do not think the assured was bound to hunt for an agent in the city of Minneapolis to whom he could make payment. If he was bound to make reasonable inquiry, I think the evidence shows that, through his agent, he did so. The agent he sent to Minneapolis to pay the premium swears that he made considerable inquiry, and names several persons to whom he applied for the name and location of an agent to whom payment could be made.

It is very clear to my mind that if the defendant had sent to the assured the circular notice of the change of agency which it sent to other policy holders, and which it intended to send to him, he would have sent his money to the proper place, and would have paid his premium in due time. It was, therefore, the fault of the defendant that the premium was not paid. This is not a case of indifference or willful neglect on the part of the assured. He was not only willing, but anxious to keep his contract. He raised the money in time and sent it to Minneapolis for the purpose of making payment. The person sent was unable to find the new agent, of whose appointment, name, and place of business both he and the assured were ignorant. He was, therefore, excused from making payment on the day the premium was due. It is said, however, that he continued to neglect payment until the day of his death, about sixty days after the maturity of the premium. If he was excused from making payment on the day of maturity by the facts and circumstances stated, then he was entitled to a reasonable time before a forfeiture could be declared. In considering what time would be reasonable, we are to bear in mind that the company had, in fact, waived the time of payment the previous year. The jury find that in 1876 the agent of the defendant at Minneapolis informed the assured

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that a delay of a month or two would not work a forfeiture, and the assured accordingly paid his premium for that year nearly a month after it was due, without objection on the part of defendant or its agents. Again, it does not appear at what time, if ever, the assured was informed of the *place of payment*.

Under these circumstances, I am of the opinion that a forfeiture cannot be declared on account of the delay in making payment of the dividend, the assured having been excused from making such payment at maturity by the fault of defendant.

The following authorities show the reluctance of courts to enforce forfeitures in this class of cases, and support the general views I have expressed: *Insurance Co. v. Wolf*, 95 U. S. 326; *Insurance Co. v. Eggleston*, 96 U. S. 572; *Insurance Co. v. Norton*, id. 234; *Insurance Co. v. Pierce*, 75 Ill. 426; *Thompson v. Insurance Co.* 52 Mo. 469; *Mayer v. Insurance Co.* 38 Iowa, 304; *Insurance Co. v. Warner*, 80 Ill. 410; *Insurance Co. v. Robertson*, 59 Ill. 123.

Judgment for plaintiff for amount of the policy and interest.

 RUBLE and others v. HYDE and others.

(*District of Minnesota.* July, 1880.)

REMOVAL.—ACT OF MARCH 3, 1875, § 2.—In order that a suit may be removed by either party, under section 2 of the act of March 3, 1875, all the persons forming the party on one side of the controversy must be citizens of states different from those of which the other party are citizens.

Motion to remand.

Gordon E. Cole, for plaintiffs.

Charles W. Bunn, for defendants.

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NELSON, *District Judge*.—A motion is made to remand this suit, which is removed from the state court on the petition of all the defendants, under the provisions of the second section of the act of March 3, 1875. The following is the clause under which the suit was removed:

“That any suit of a civil nature, at law or in equity, now pending * * * in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the circuit court of the United States for the proper district.”

The suit was brought by the plaintiffs, a firm doing business in, and citizens of, the state of Minnesota, against seven defendants, three of them citizens of the state of Wisconsin, two citizens of the state of Iowa, and one Henry Rowell, a citizen of Minnesota. The citizenship of one defendant, Hunting, is not given in the petition, but it appears by an affidavit in the record that he is not a citizen of the state of Minnesota.

The plaintiffs seek to recover an alleged indebtedness due from the defendants jointly as copartners. To sustain this cause they must prove a partnership between all the defendants, which is denied by those not citizens of the same state with the plaintiffs, and also by Rowell, the defendant who is a citizen of the same state.

Rowell is not a nominal party to this suit, and, being a citizen of the same state with the plaintiffs, the controversy about which the suit was instituted in the state court is not between citizens of one or more states on one side, and citizens of other states on the other side.

In order that a suit may be removed by either party, under the provision of section 2, in the act of 1875, above quoted, all the persons forming the party on one side of the controversy must be citizens of states different from those of which the other party are citizens.

In other words, as I understand the act of 1875, the change

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made by the clause is that the parties to the controversy, without reference to their position in the pleadings as plaintiffs or defendants, may be arranged on opposite sides; and if on one side each individual is a citizen of a different state from those of which the individuals on the other side are citizens, then the suit may be removed. Such is not the case here. See *Burke v. Flood*, 1 Fed. Rep. 541; *Myer v. Delaware R. R. Construction Co.*, October term, 1879, U. S. Sup. Ct., 12 Chicago Leg. News, 135.

It is not necessary to consider the other point raised on the argument.

Motion granted.

LEGGETT and others v. COLE.

(*District of Minnesota.* July, 1880.)

GEN. STAT. OF MINNESOTA (1878), ch. 75, § 2 — EQUITY DOCKET.—A suit brought under the statutes of Minnesota (Gen. Stat. 1878, ch. 75, § 2) by a party in possession of real property, to settle an adverse claim, belongs on the equity docket. *Meighen v. Strong*, 16 Minn. 177, followed.

Motion to transfer suit to equity docket.

Henry J. Horn, for plaintiffs.

Albert L. Levi, for defendant.

NELSON, *District Judge*.—This case belongs on the equity docket. The statute permitting a party in possession of real property to bring a suit to settle an adverse claim reads as follows: "An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien, or interest; and any person having or claiming title to vacant or unoccupied real estate may bring

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an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively." Gen. Stat. of Minn. (1878), ch. 75, § 2. This statute enlarges the class of cases in which equity affords relief in quieting title and possession of real estate.

It was necessary, previous to the enactment of this statute, that the right of the party in possession should be established by repeated judgments in his favor, in actions at law against him, before he could maintain a suit. This statute confers upon the possessor of real property a new right which enables him, without delay, to draw to himself outstanding inferior titles; and the facts are not to be tried by a jury unless the court orders an issue, or the parties consent to such trial. Such was the opinion of the supreme court of the state. *Meighen v. Strong*, 6 Minn. 177-182.

The suit will be transferred to the equity calendar.

McMAHON v. HENNING, Receiver.

(*District of Kansas. July, 1880.*)

1. **MASTER AND SERVANT — NEGLIGENCE.** — A master is liable for negligence in the use of defective machinery, whereby his servant was injured, although the negligence of a fellow servant contributed to the injury.
2. **SAME — RECEIVER — COMPILED LAWS OF KANSAS (1879), ch. 84, § 29.** — *Quare*, whether a receiver, engaged in the operation of a railroad, is a "railroad company" within the meaning of section 29, ch. 84 of the Compiled Laws of Kansas (1879), which provides that "every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of the engineer or other employe, to any person sustaining such damage."

Motion for new trial.

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Gage & Ladd, for plaintiff.

Pratt, Burmbach & Ferrey and *S. O. Thatcher*, for defendant.

McCrary, *Circuit Judge*. — The plaintiff sued defendant, as receiver of the Lawrence, Leavenworth & Galveston Railroad Company, to recover damages for personal injuries received while in defendant's employ. The defendant was, at the time of the accident, engaged in operating said railroad under an appointment from this court as receiver thereof. The plaintiff sought to recover upon two grounds: *First*, that his co-employee, one Bowles, who, at the time of the accident, was acting as yard master, was guilty of negligence in running certain cars together, to be coupled, at a great and dangerous speed, causing the injury to plaintiff, who was engaged in coupling; and *second*, that defendant was guilty of negligence in using cars dangerous and defective in their construction, whereby plaintiff was injured. It was alleged that the coupling pin was old and bent, and that the bumpers were improperly constructed and located, and were thereby rendered exceedingly and unnecessarily dangerous. Issue was joined upon these allegations, the cause was tried before a jury, and there was a special finding by the jury as follows:

The jury was directed to answer the following questions: "If the jury find the defendant guilty of negligence, which caused the injury to plaintiff, they will state in what it consists;" and the jury answered as follows: "*Answer*. That the coupling pin was worn and bent, and that there was negligence on the part of Bowles, the yard master, in not doing his duty carefully, and in not informing plaintiff of his change of purpose in placing the cars, and in the use of the cars with this particular pattern of bumpers or dead-wood." The jury also find specially that the cars were not in good repair; that the coupling pin was worn and bent; that the cars were not such as were generally in use on western roads; that the plaintiff's injury was in part caused by the use of defective

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bumpers; and that the bumpers used were more dangerous than others, by reason of being placed on the *side* of the draw bar instead of *above* it.

An act of the legislature of Kansas, entitled "An act to define the liability of railroad companies in certain cases," approved February 26, 1874, provides as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of the engineer or other employe, to any person sustaining such damage." Comp. Laws of Kansas, 1879, ch. 84, § 29, p. 784.

The defendant moves to set aside the verdict, and for a new trial, upon the ground that the court erred in charging the jury that the statute was applicable to this case; and his counsel argues with much force that a receiver, engaged in the operation of a railroad, is not a "railroad company," within the meaning of the act. In the view I take of the case it is not necessary to decide this important question.

By the special finding the fact is established satisfactorily, I think, that the injury resulted from the negligence of the defendant in furnishing defective machinery for the use of his employes in performing the very dangerous duty of coupling cars. The coupling pins were old and bent, and the bumpers or dead-wood were not properly arranged, so that the whole was cumbersome, inconvenient, and dangerous. This was a plain violation of duty on the part of the defendant. Ordinary care clearly requires, of persons engaged in operating railroads, that they shall supply to their servants reasonably safe and convenient apparatus and machinery for use in the performance of their perilous duties. But it is also found that the negligence of Bowles, the yard master, and a co-employe of plaintiff, contributed to the injury, and it is insisted that it follows that plaintiff cannot recover unless he is within the provisions of the statute above quoted.

This presents the question whether, upon the facts found by

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the jury, the defendant is liable, independently of the statute, and upon the principles of the common law. The rule of the common law is that a master is not liable to his servant for the negligence of a fellow servant, and it was to abrogate this rule, in the state of Kansas, that the statute was enacted. But the common law rule has never, to my knowledge, been carried so far as to permit the master to exempt himself from the consequence of his own personal negligence by showing that one of his servants (not the party injured) has been likewise negligent. In the present case the master was negligent, while the plaintiff, the injured party, was not negligent.

This makes out a case at common law, notwithstanding the negligence of Bowles, the fellow servant. The plaintiff recovers upon the ground of the negligence of the defendant, which is of itself a good and sufficient ground. The doctrine of contributory negligence has no application to such a case. That doctrine applies only to cases where there is negligence on the part of the person injured.

The true doctrine of the common law is that the master is liable to his servants as much as to any one else for the consequence of *his own* negligence; and it is no defense for him to show that the negligence of a fellow servant (for which he was not responsible) also contributed to bringing about the injury. *Shearman & Redfield on Negligence*, § 89; *Fifield v. Northern R. Co.*, 42 N. H. 225; *Hough v. Railway Co.*, 100 U. S. 213; *Cayzer v. Taylor*, 10 Gray, 274; *Paulmier v. Erie R. Co.*, 5 Vroom (N. J.), 151, 157.

In *Cayzer v. Taylor* the supreme court of Massachusetts state the rule as follows: "But we are not prepared to say that if one uses a dangerous instrumentality, without the safeguards which science and experience suggest, or the positive rules of law require, he is not responsible for an injury resulting from such use because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury." 10 Gray, 281. That was a case in which a servant sued his master for injuries from the collapse of a steam boiler used

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in the defendant's manufactory, in which the plaintiff was employed.

It is now well settled that there are certain well defined exceptions to the general rule that the common employer is not liable to one employe for the negligence of a co-employe in the same service. "These exceptions," says Mr. Justice HARLAM, in *Hough v. Railway Co.*, *supra*, "resting as they do upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken." And he adds that "one, and perhaps the most important of those exceptions, arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence on the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery and other instrumentalities adequately safe for use by the latter." It was accordingly held in that case that the rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required, and that the defendant in that case was liable for injuries resulting from the use of a defective engine in operating its railroad, notwithstanding the defects may have resulted from the negligence of the master mechanic and foreman of the round-house, who were co-employes with the person injured. To the same effect are the following authorities: *Ford v. Railroad Co.*, 110 Mass. 241; Wharton on Negligence, secs. 211, 212, 232 *a*, and cases cited in note to *Hough v. Railway Co.*, 100 U. S. 224.

Motion for a new trial overruled. An order for payment of the plaintiff's judgment will be entered.

FOSTER, *District Judge*, concurs.

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CORBIN v. THE BOARD OF COUNTY COMMISSIONERS OF WASHINGTON COUNTY, KANSAS.

(District of Kansas. August, 1880.)

1. **STATUTE — CONTRACT — CONSTITUTION, ART. 1, § 10.**— A statute providing in effect for the return, with interest, of all money paid by a purchaser at a tax sale, if by reason of invalidity or irregularity the sale could not be consummated, constitutes, when acted upon, a contract, within the meaning of article 1, § 10 of the constitution.
2. **SAME — SAME — SAME.**— A subsequent statute, providing in effect that such purchaser should have no right to the return of his money in any case, unless the board of supervisors should see proper to so order, is void in so far as it purports to apply to pending cases, and to affect existing vested rights.
3. **SAME — SAME — SAME.**— A subsequent statute, providing in effect that after the conveyance of the land the money should not be refunded unless the party claiming under the tax deed should deliver a quitclaim deed, "executed to such person or persons as the commissioner may direct," is a reasonable and proper exercise of the power of the legislature to modify without impairing the remedy, and is therefore valid.

Motion for judgment for defendant on the pleadings.

Brown & Campbell and *Mr. Gillette*, for plaintiff.

W. W. Guthrie, for defendants.

McCRAE, Circuit Judge.—1. At certain tax sales made by the authorities of Washington county, Kansas, the plaintiff bid in numerous tracts of land in that county for delinquent taxes, and, having paid the sums bid, received from the treasurer of the county certificates of sale. The plaintiff, and those under whom he claims, subsequently paid accruing taxes upon the same lands, amounting in the aggregate to a large sum. It is alleged by the plaintiff, that, for some of the lands so purchased, the county clerk, after the time for redemption had expired, refused to execute deeds, upon the ground that he had discovered that, for errors and irregularities in the sales, the said lands ought not to be conveyed. For the remainder of

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the lands purchased by plaintiff deeds were executed, but the complainant alleges that the sales were invalid, and that, under the statute of Kansas, to be presently mentioned, he is entitled to a return of the money paid by him, and interest, for all the lands bid in by him, whether deeded or not. The answer denies the material allegations of the petition, except as to the fact that plaintiff purchased the lands in question at tax sales. The statutory provisions to be considered are as follows: At the time of the tax sales, sections 120 and 121, Gen. Stat. 1868, were in force. These sections are as follows:

"Section 120. If the county treasurer should discover, before the sale of any land for taxes, that on the account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon such sale, the county clerk shall discover that for any error or irregularity such land ought not to be conveyed, he shall not convey the same; and the county treasurer shall, on the return of the tax certificate, refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum.

"Section 121. If, after the conveyance of any land sold for taxes, it should be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum, upon the delivery of the deed to be cancelled; and in all such cases, where the county treasurer shall have offered to the person entitled thereto his money as aforesaid, and such person shall refuse to receive it and cancel the deed, he shall not be entitled to receive any interest on the money so paid by him after the day of such offer and refusal, nor shall any recovery ever be had against the county on the covenants of such deed."

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These sections remained the law unchanged until 1876, when they were respectively amended as sections 145 and 146 of chapter 34, Laws 1876, and all the old sections were repealed. Section 145 is as follows:

"Section 145. If the county treasurer shall discover, before the sale of any lands for taxes, that, on account of any irregular assessment, or from any other error, such lands ought not to be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon any sale, the county clerk shall discover that, for any error or irregularity, such land ought not to be conveyed, he shall not convey the same. And the county treasurer shall, on the return of the tax certificate with the refusal of the county clerk indorsed thereon, refund the amount paid therefor on each sale, and all subsequent taxes and charges paid thereon by the purchaser, or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum."

Section 146 is as follows:

"Section 146. If, after the conveyance of land sold for taxes, it shall be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum, upon the delivery of *a quitclaim deed from the party claiming under the tax deed, executed to such person or persons as the commissioners may direct*. In all such cases no interest shall be allowed after the person claiming under the tax deed shall have received notice that such deed has been discovered or adjudged invalid."

This remained the law until 1879, when said sections were respectively changed and repealed by chapter 40, Laws 1879. Section 2 of that chapter is as follows:

"If the county treasurer shall discover, before the sale of any lands or lots for taxes, that, on account of any irregular assessments, or from any other error, such lands ought not to

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be sold, he shall not offer the same for sale; and if, after any certificate shall have been granted upon any sale, *the board of county commissioners shall discover that*, for any error or irregularity, such lands or lots ought not to be conveyed, *they may order the county clerk not to convey the same*; and the county treasurer shall, on the return of the tax certificate with a certified copy of such order of the board of county commissioners, refund the amount paid therefor on such sale, and such of the subsequent taxes and charges paid thereon by the purchaser or his assigns as may be so ordered by the board of county commissioners, out of the county treasury, with interest on the amount so ordered refunded at the rate of ten per cent. per annum; *and in all cases in which actions shall be now pending, or may be hereafter commenced*, the refusal of the county clerk to convey any lands or lots indorsed on any tax certificate *shall not be deemed or held to constitute prima facie evidence of any irregular assessment or other error for which such lands or lots ought not to be conveyed, nor shall any judgment be recovered against such county, or the board of county commissioners thereof, or liability held to attach therefor, under or by virtue of the provisions of said section 145, as theretofore and hereafter existing, or of section 120, ch. 107, Gen. Stat., except in cases in which the board of county commissioners shall have made an order for the refunding thereof, and then only for the amount specified in the order for such refunding, and in all cases in which invalid taxes shall be included in such certificate, and only to the extent of such invalid taxes, with ten per cent. interest thereon.*"

Section 3 is as follows:

"If, after the conveyance of lands or lots sold for taxes, it shall be discovered or adjudged that the sale was invalid, the board of county commissioners *may, by proper order*, cause the money paid therefor on the sale, together with *such* subsequent taxes and charges paid thereon by the purchaser or his assigns *as they may judge proper*, to be refunded, with interest on such amount at the rate of ten per cent. per annum, upon

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the delivery of a quitclaim deed from the party holding under the tax deed, executed to such person or persons as the commissioners may direct *in such order*. In all such cases no interest shall be allowed after the person claiming under the tax deed shall have received notice that such tax deed has been discovered or adjudged invalid."

Upon these facts the defendant moves for judgment on the pleadings. If the last named act (act of 1879) is valid and effectual for the purpose of depriving plaintiff of the remedy given by the pre-existing acts, then the motion must be sustained, otherwise the case must be heard upon the proofs. The decision of the present case depends upon the question whether the acts of 1868 and 1876, and what was done under them, amounted to a contract, the obligation of which was impaired by the act of 1879. The first and second acts are substantially alike. They differ only as to details, and not in any substantial matter. The former was in force at the time of the tax sales, and the latter at the expiration of the time for redemption. They each provide for refunding to the purchaser at the tax sale the money paid by him, in all cases where it is discovered, before a deed is made, that, for any error or irregularity, the land ought not to be conveyed; and in all cases where, after a deed is made, it is discovered that the sale was invalid. It is distinctly provided that in the former case the county treasurer "shall refund the amount paid therefor on such sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, out of the county treasury, with interest on the whole amount at the rate of ten per cent. per annum;" and, in cases of the latter kind, that "the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum," etc.

These provisions are found in the revenue law of the state. Their purpose is manifest. The state is largely interested in the prompt collection of its revenue. Where the owner of

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property fails to pay the taxes due thereon, it becomes a matter of interest to the state to induce others to come forward and make the payment, taking a lien upon the property, which, in default of redemption, may ripen into a title. But tax titles are very uncertain, and investments in them are often precarious, because of errors and irregularities which may not be known to the purchaser, and which may vitiate the sale. In order, therefore, to induce capitalists to come forward and invest their means in such manner as to replenish the treasury, the state of Kansas, by the acts of 1868 and 1876, said to all such, "If you will bid at tax sales and pay your money, the amount invested, with interest, shall be refunded from the county treasury, in case the sale is afterwards discovered to be irregular or void." This legislation did not of itself amount to a contract, but I think it did amount to a proposition on the part of the state, which, when accepted and acted upon, became a contract binding upon the state, as well as upon the other party. In the present case, the proposition embodied in the statute was accepted by the plaintiff. Upon the faith of it he invested his money.

I know of no element of contract that is wanting. There was a stipulation, by the agreement of minds, upon a sufficient consideration, that the plaintiff, having bid off the lands at tax sale, and paid his money therefor, should be entitled to receive his money and interest from the county treasury, if, by reason of irregularity or invalidity, the sale could not be consummated. *Farrington v. Tenn.*, 95 U. S. 679.

I am of the opinion, therefore, that the acts of 1868 and 1876, and what was done under them, amounted to a contract, within the meaning of the contract clause of the constitution of the United States. Constitution, art. 1, § 10.

It only remains to be determined whether the act of 1879, passed after this suit was brought, impairs the obligation of the pre-existing contract. Upon this point there can scarcely be a doubt. The last act repeals the former, and substitutes for it a provision which, if valid, absolutely deprives the plaintiff

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iff of his vested rights. By the law under which plaintiff invested his money, he was to have a return of his money and interest if the sale was found to be irregular or invalid. By the act of 1879 he has no right to the return of his money in any case, unless the board of supervisors shall see proper to so order. It requires no argument to show that, where a valid debt exists under a contract, an act of the legislature declaring that it shall be paid only at the option of the debtor is a void act.

The general doctrine that a state may, by legislative enactment, enter into a binding contract, the obligation of which cannot be impaired by subsequent legislation, is well settled. *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164, 166; *Dartmouth College Case*, 4 Wheat. 518; *Bank v. Knoop*, 16 How. 369; *Davis v. Gray*, 16 Wall. 203; *Tennessee v. Sneed*, 96 U. S. 69; *Keith v. Clark*, 97 U. S. 454.

In *Edwards v. Kearzey*, 96 U. S. 595, it was held that the remedy subsisting in a state when and where the contract is made, and is to be performed, is a part of the obligation; and any subsequent law of the state, which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution of the United States, and therefore void. The act of 1879, now under consideration, certainly impairs, substantially, if it does not absolutely destroy, the remedy given by the previous law, and it must, therefore, be held to be void in so far as it purports to apply to pending cases and to affect existing vested rights. It is competent for the legislature to modify, but not to destroy or impair, the remedy. *Tennessee v. Sneed*, *supra*.

2. Section 146, ch. 34, Laws 1876, quoted above, provides that if, after the conveyance of land sold for taxes, it shall be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes, etc., to be refunded, etc., "upon the delivery of a quitclaim deed from the party claiming under the tax deed, executed to such person or persons as the

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commissioners may direct." This provision, although enacted after the tax sales, is a reasonable and proper exercise of the power of the general assembly to modify without impairing the remedy; and before plaintiff can recover upon so much of his claim as is based upon sales and deeds executed, he must allege and show that he offered to quitclaim "to such persons as the commissioners might direct," and that the offer was refused.

The allegation in the petition that plaintiff offered to quitclaim to defendants is not sufficient. Plaintiff may have leave to amend in this respect.

3. It is insisted by defendants' counsel that, after the refusal of the county clerk to make deeds as alleged in the first cause of action, he reconsidered his action and tendered in writing such deeds. The clerk has no power to reconsider his action in such a case, unless it can be shown that it was taken under a mistake. If the defendants can now show that the sales were regular and valid, and that the refusal of the clerk was in ignorance of the facts, then the plaintiff cannot recover, but must accept the deeds. If the clerk refused to make deeds, as alleged, then the burden is upon the defendants to show the validity and regularity of the sales.

The motion for judgment for defendant on the pleading is overruled.

MERSMAN v. WERGES and another.

(District of Iowa. June, 1880.)

1. **FORGERY — ACCOMMODATION NOTE — INNOCENT INDORSEER.**— The accommodation note of an individual partner, secured by a mortgage upon the wife's separate property, and made for the benefit of the firm, is utterly void in the hands of an innocent indorsee, as against the wife of the maker, where the name of the wife was forged, prior to indorsement, as the joint maker of such note, by the payee and managing partner of the firm.

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2. **SAME — SAME — MORTGAGE.**—The mortgage given to secure the note, although duly executed by the husband and wife, is rendered void by such forgery.
3. **JURISDICTION — FORECLOSURE — ASSIGNOR AND ASSIGNEE.**—In such case a federal court could not assume jurisdiction of a suit by the assignee upon the mortgage alone, when the assignor and the mortgagor are both citizens of the same state. *Sheldon v. Sell*, 8 How. 441, followed.

In equity.

Wright, Gatch & Wright, for complainant.

J. O. Crosby and Parsons & Runnells, for respondents.

Love, District Judge. — This is a bill to foreclose a mortgage upon certain lands, the property of Lucy W. Werges, situated in Clayton county, Iowa. The husband, Casper A. Werges, joined in the mortgage without any title to the lands, or any interest, except what the law gives him. The essential facts are as follows:

Casper A. Werges, with one E. H. Kreuger, now deceased, was engaged in the milling business at Clayton county, Iowa, under the firm name of Kreuger, Werges & Co. E. H. Kreuger was the managing partner. Werges seems to have committed the business to his exclusive control. Kreuger went to St. Louis and agreed with the complainant for a loan of \$6,000 to the firm of Kreuger, Werges & Co., and for their use and benefit. To secure this loan, Casper A. Werges executed his note, payable to the order of Kreuger, his partner. The mortgage in question was also executed and delivered, with the note, to Kreuger. Kreuger, while the note was in his possession, and before its delivery to the complainant, forged the name of Mrs. Werges to the note. He indorsed this forged note to the complainant, placed the mortgage in the hands of the recorder for record, and received the \$6,000, for which the note and mortgage were given.

The complainant was wholly ignorant of the forgery, and in nowise implicated in it. His perfect good faith in the

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transaction cannot be impugned. I find the fact to be that Kreuger committed the forgery of Mrs. Werges' name. There is no direct evidence to establish the fact, but the negative and circumstantial evidence is, to my mind, conclusive.

It is in evidence, and not, I think, seriously questioned, that when the note passed into the hands of Kreuger the name of Mrs. Werges was not signed to it. Her name was placed upon the note by somebody who had an interest in so doing. Neither she nor her husband signed her name to the note. Her name was put to the note without her knowledge or content. There is no evidence that the note was ever in the possession, after its delivery to Kreuger, of any person but Kreuger and the complainant. The complainant did not commit the forgery. This is conceded. Who, then, did commit the forgery? It must have been some one who had an interest in the note, and a motive to commit the crime. No stranger to the note, without interest or motive, would have forged Mrs. Werges' name, or could have done it without possession of the note. Casper A. Werges did not sign his wife's name to the note. She did not subscribe her name to it. Mersman did not. It was never, that we know of, in the hands of any stranger to the instrument. The inevitable conclusion is that Kreuger committed the forgery.

We can easily find a motive moving Kreuger to use the name of Mrs. Werges as he did. He probably found or apprehended difficulty in negotiating the note to Mersman without the name of Mrs. Werges. It is admitted by the complainant's counsel that it was understood by both Kreuger and Mersman that the note was to be signed by Mrs. Werges. This being the case, Kreuger had reason to believe that he could not get the money from complainant without the signature of Mrs. Werges to the note.

In order, therefore, to get the money Kreuger forged the name of Mrs. Werges to the note.

Perhaps he assumed in his own mind that he might do this with impunity, if not propriety, since by signing her name

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he would not substantially increase her liability, seeing that she had agreed to pledge her land by mortgage for the debt; or it is possible that to Kreuger's mind it appeared that the name of Mrs. Werges to the note would, under the circumstances, be at most a mere matter of form.

The note and mortgage must be treated as one contract. The parties evidently so intended them. They were delivered together, and at the same time, as security for the debt. The complainant would not otherwise have received them, and advanced the money upon them. Considered in this light, they must be construed together, and their true character is that of accommodation paper. The paper was especially such as to Mrs. Werges, who received no consideration whatever for executing the mortgage. Casper A. Werges executed the note for the accommodation of the firm to which he belonged, and his wife joined him in the mortgage to secure the same. She was clearly a surety for the firm of Kreuger & Werges. She executed the mortgage for the accommodation of that firm. The note and mortgage were in form given to Kreuger, and made payable to his order, to enable him to indorse the note, and thus transfer both note and mortgage to the complainant as security for the money to be loaned by the plaintiff to the firm.

While the note and mortgage were in the hands of Kreuger, and before the transfer, Kreuger forged Mrs. Werges' name to the note. He thus entirely changed her relation to the transaction. He made her a principal instead of a surety in the contract evidenced by the note and mortgage. Can it be doubted that the moment Kreuger changed the contract without Mrs. Werges' consent she was released? She signed the contract for the accommodation of the firm. A member of the firm so changed it, without her authority, as to make her a principal instead of an accommodation party. Surely, then, the note and mortgage ceased, as to her, to have any validity in the hands of Kreuger, and Kreuger could transfer to the complainant no better title as against Mrs. Werges than he himself had. The contract evidenced by the note and mort-

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gage was not Mrs. Werges' contract after the forgery of her name to the note, and it could not be made her contract by its transfer to the complainant. The instrument which Mrs. Werges signed was not negotiable, and the note ceased to be so in the hands of Krenger after he destroyed its identity, and made it a different note from that which the parties had signed, by the forgery of Mrs. Werges' name to it.

Suppose a party holding negotiable paper delivered to him for his own accommodation, for the purpose of enabling him to raise money upon it, makes a material alteration of it, and then passes the paper for value to an innocent indorsee. Can the original accommodation makers be held upon the paper? Clearly not, because the paper passed to the innocent indorser is not the deed of the accommodation makers. Nothing is better settled in the law of negotiable paper than that those defenses which go to the very inception and validity of the paper may always be set up against an innocent holder of the paper. Hence, where the name of a party has been forged to a negotiable bill or note, or where it has been executed without his authority, it is utterly void as against him in the hands of an innocent holder or indorsee. The same rule must undoubtedly hold as to any material alteration made after its execution or indorsement, when it is sought to enforce the paper against the maker or indorser. Suppose the holder of a note for one thousand dollars should change it to two thousand dollars, and then indorse it before due for value, could the maker be made liable upon it? Would such an instrument be the deed or contract of the maker? Would the holder have any authority whatever to bind the maker by indorsing it over for value?

But it is insisted that, even setting aside the note as utterly null and void, this suit can be maintained upon the mortgage alone; that Mrs. Werges undeniably executed the mortgage, and her genuine signature to it; that the real consideration of the mortgage was the debt of \$6,000 due from the firm of Werges & Kreuger to the complainant; that the note was at

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most but evidence of that debt; and that the real purpose and intention of Mrs. Werges in giving the mortgage was to secure the debt. Hence, it is argued that the provision of the mortgage, that it should stand as a security for the payment of the note of Casper A. Werges to E. H. Kreuger, was more a matter of form than substance, and that it can be no wrong to Mrs. Werges to compel payment by the sale of her property of the very debt that she purposely pledged it to pay.

It will be seen that this argument is exceedingly ingenious and plausible. It is, however, in my judgment, untenable.

Mrs. Werges saw fit to pledge her land by mortgage to pay a note executed by her husband to Kreuger. *Non constat* that she would have mortgaged her property in any other form. If she had been asked to give a mortgage to secure the debt of the firm of Kreuger & Werges to the plaintiff, she might, for aught we know, have refused. Parties may contract in a certain form, and they have a right to do so. The law cannot change their contract, and hold them to the substance of it in a wholly different form.

The debt in this case was not Mrs. Werges'. The consideration did not move to her. Her property is bound for it only by virtue of her express contract. She cannot be made liable on the ground that she received the consideration, and therefore that, irrespective of the written evidence, she is bound to pay the debt. She can be made liable for the debt only in pursuance of the terms of her written contract, and not otherwise. In order to have fixed her liability, or rather that of her property, it would have been necessary, as the contract was actually made for Mersman, to present the note to Casper Werges, the maker, and protest it for non-payment. Setting aside the note as a part of the contract, and proceeding directly upon the mortgage, no demand, notice or protest was necessary. In a word, by treating the note as a nullity, and proceeding directly on the mortgage, a collateral and conditional liability would be changed into a direct and absolute liability.

Again, as the contract was, in fact, made, Mrs. Werges was

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a surety for her husband. She pledged her property, without consideration to her, for his debt. If we set aside and disregard the note, and proceed upon the debt and mortgage directly, she becomes a joint debtor with her husband upon the face of the contract of mortgage. She is a joint obligor with her husband, and in order to entitle herself to any of the rights of a surety she must resort to parol evidence, showing her true relation to the debt. In a word, by setting aside the note, to which the mortgage was a mere incident, and treating the mortgage as the evidence of indebtedness, we change the position of Mrs. Werges upon the face of the written contract from that of a surety, which she was, to that of a principal debtor, which she was not. Again, the debt was, in fact, not that of her husband individually. It was the debt of the firm. By charging her directly upon the mortgage, making the debt, not the note, the basis of her liability, she becomes the surety, not of her husband, which she in fact was, but the surety of the firm of Kreuger & Werges, which she in truth was not.

Lastly, if we reject the note and count exclusively upon the mortgage, the jurisdiction here clearly fails. The mortgage was not a negotiable instrument; it was given to Kreuger in his name, and by him assigned by delivery to the complainant. Kreuger could not have sued these defendants in this court upon the mortgage, being himself a citizen of Iowa. Therefore his assignee, the complainant, cannot maintain an action here. The complainant is clearly within the prohibition of the judicial act, and the amendatory act of 1875. See *Sheldon v. Sell*, 8 How. 441, 449.

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JONES v. MILLER.

(District of Nebraska. May, 1880.)

1. EVIDENCE — RECORD OF FORMER SUIT — IDENTITY OF CONTROVERSY.— Where the question in controversy relates to the identity of certain land, record evidence is admissible to show that the same controversy has been litigated between the defendant and the plaintiff's grantor, and determined by the state court.
2. SAME — GRANTOR AND GRANTEE — ADVERSE POSSESSION.— The adverse holding of a grantor who has given a warranty deed, must be established by clear and undoubted testimony, showing a change in the relations of the parties towards the land.

In equity.

John D. Howe and George W. Ambrose, for complainant.

E. Wakeley, for respondent.

McCABY, *Circuit Judge*.—This is a bill to quiet title to a tract of land in the city of Omaha, known as part of block 172½ in the Omaha City Company's survey. This survey was made prior to the time when the title of the United States was extinguished. The government title, however, subsequently vested in one John A. Horbach, who made several deeds, describing the land conveyed by reference to said plat. It appears that lots were bought and sold during a considerable period of time by reference thereto, and that the plat was published and well known in the community. The principal question in dispute here is as to whether the land now in controversy is identical with said block 172½. Both parties claim under Horbach as a common source of title, and each holds a deed for a tract of land coming from him through several mesne conveyances. On the sixteenth of January, 1858, Horbach conveyed by warranty deed, to one Moffat, eight lots in said block 172½; in February, 1878, Moffat conveyed the same by the same description to B. F. Allen; and in March, 1876, Allen conveyed to defendant Miller. In

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1872 Horbach conveyed the land now in controversy, by metes and bounds, without reference to the plat, to one Griffith, who in August, 1873, conveyed to plaintiff.

The case turns upon a question of fact, to wit: whether block 172½ is within the tract conveyed to the plaintiff. If so, defendant has the earlier deed and the better title. There is nothing on the face of the plat to fix definitely its precise location; and great difficulty is experienced now in determining this question, because of the obliteration of the landmarks of the survey, and the absence of a record fixing a starting point from some natural or permanent monument, which can now be found.

Upon a careful examination of the evidence I have reached the conclusion that the initial point from which the survey, relied upon by the defendant, was made, was the correct one.

The question is certainly not one free from doubt and difficulty, but I think the weight of evidence supports the theory of the defendant. Whatever doubt I might otherwise have would be resolved in favor of the defendant, by consideration of the fact appearing in evidence that this identical controversy has been litigated in the courts of Nebraska and decided in favor of defendant. See *Horbach v. Miller*, 4 Neb. 31.

It is true that Jones, the present plaintiff, was not a party to that suit, and is, therefore, not absolutely concluded by the judgment therein. But the record of the case is nevertheless admissible as evidence of the defendant's title as against Jones, who was the grantee of Horbach, the latter remaining in possession at the time of the suit. Under the circumstances adduced in evidence, I regard that adjudication as entitled to great weight in the determination of the question at issue in this case. Horbach had warranted the title, and being himself in possession, assumed the duty of defending the suit. He raised the same questions that are now presented, and they were contested throughout a protracted and earnest litigation. It is not to be presumed that Jones was ignorant of this litigation. Assuming that he was the *bona*

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fide purchaser and the real owner — which, however, does not appear,— I should be inclined to hold, upon all the evidence, that Horbach was acting for him in making the defense.

Upon the question of the admissibility of the record in the ejectment suit, as evidence against Jones, see *Chirac v. Rein-ecker*, 2 Pet. 618.

One other question requires consideration. The plaintiff claims title by virtue of an alleged exclusive, adverse, and notorious possession in Horbach and his grantees since 1860, and he pleads the statute of limitations. It appears in evidence that Horbach enclosed a large tract of land, including the premises now in controversy, and exercised acts of ownership over the whole.

It does not, however, in my judgment, sufficiently appear that as to the tract now claimed by defendant, there was such adverse holding, under claim and color of title, as the law contemplates. Holding, as I do, that Horbach had sold this tract, by warranty deed, to Griffith, it follows that, to give him the benefit of the statute of limitations, I must be satisfied that he held adversely to his own grantee. I do not say that in no case a grantor, who has given a warranty deed, can hold adversely to his grantee, but I am clearly of the opinion that such holding must be established by clear and undoubted testimony, showing a change in the relations of the parties toward the land. The evidence here simply shows that Horbach enclosed this tract with other lands owned by him, and the presumption of the law in such a case is, that, as to the portion which he sold and conveyed, he was in possession in amity with, and in subservience to, the title he had given.

Where there is no claim of right the possession cannot be adverse to the true title. It follows, from these considerations, that there must be decree for the defendant.

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WILSON, Assignee, v. NATIONAL BANK OF ROLLA.

(*Western District of Missouri.* July, 1880.)

1. **BANKRUPTCY — SET-OFF — USURY — REV. STAT. § 5073.**— Section 5073 of the Revised Statutes, relating to set-offs in bankruptcy proceedings, provides that "in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtors to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition. *Held*, that under this section a judgment obtained by an assignee in bankruptcy, for a penalty incurred by the violation of a state statute against usury, could not be set off against a claim of the judgment debtor against the bankrupt estate.
2. **SAME — JURISDICTION OF CIRCUIT COURT — BILL OF REVIEW — REV. STAT. § 4986.**— Under section 4986 of the Revised Statutes the circuit court has jurisdiction of a bill to set aside an order of the district court directing such offset to be made.

Bill of review.

B. B. Kingsbury, for plaintiff.

L. F. Parker, for defendant.

McCABY, Circuit Judge.— This is a case growing out of proceedings in the district court in the matter of William James, bankrupt. The defendant was a creditor of said bankrupt, and proved its claim, which was upon a promissory note amounting, with interest, to \$5,000. The note was secured by mortgage, but after exhausting the security there remained a balance due against the bankrupt's estate of \$2,803. The said note was usurious, and the assignee of said bankrupt, the present plaintiff, recovered judgment against the defendant for the statutory penalty for violating the usury law of Missouri, in the sum of \$620. This judgment was recovered some time after the commencement of the bankruptcy proceedings. Thereupon the defendant petitioned the district court for an order directing that the said sum of \$620, the

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amount of said judgment, be applied as a credit or offset upon its claims against the estate. The district court granted the prayer of defendant's petition, and ordered the offset to be made accordingly. The present bill is brought to set aside this order as erroneous.

1. I am of opinion that this proceeding is properly instituted under the provisions of section 4986 of the Revised Statutes of the United States, which gives to the circuit court general superintendence and jurisdiction of all cases and questions arising in the district court when sitting as a court in bankruptcy.

2. The case upon the merits must turn upon the construction of section 5073 of the Revised Statutes, which is as follows:

"Section 5073. In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition."

The defendant bank held an unsecured claim, duly proved, against the estate of the bankrupt, and the assignee of the bankrupt held a judgment against the defendant bank for \$620, for penalty incurred by the violation of the statute against usury. Were these "mutual debts" within the meaning of the statute? In order to make a proper case for set-off, under the statute, the debts must be mutual; must be in the same right. *Sawyer v. Hoag*, 17 Wall. 610, 622. If it be conceded that a judgment for this penalty, recovered by the bankrupt before his bankruptcy, would have been a debt, within the meaning of the statute, which could have been set off against the balance due on the bank's claim, does it follow that a judgment obtained by the assignee after the bankruptcy must be regarded in the same light? It is very clear that a liability for violation of a penal statute is not a debt, within the terms

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of the law, and that is all the claim there was in favor of the bankrupt at the time of the adjudication in bankruptcy. As between the assignee and the bank is there such mutuality as the law requires? Are there two debts in the same right? The assignee sues on behalf of all the creditors, and the judgment recovered by him is assets in his hands for the payment, *pro rata*, of all the debts of the estate. The affairs of the bankrupt must be settled as of the date of his bankruptcy. If there was no right of set-off at that date there was none afterwards.

I am of the opinion that the "mutual debts" and "mutual credits" which may be set off under the act are such as existed at the time that the bankruptcy proceedings were commenced. It is expressly declared, in the section above quoted, that "no offset shall be allowed of a claim in its nature not provable against the estate." What claims are provable? This question is answered by the statute: "All debts due and payable from the bankrupt at the time of the commencement of the proceedings in bankruptcy * * * may be proved against the estate of the bankrupt. Rev. Stat. § 5067."

And the same rule governs in determining what are assets of the bankrupt. These include "all the estate, real and personal, of the petitioner; all *debts* due him, or any person for his use; all his rights of action for property or estate;" and "any cause of action which he has against any person arising from contract," etc.; but do not include any cause of action founded in tort. The "mutual debts," then, to which the statute refers, are debts in favor of and against the bankrupt at the time of commencement of proceedings in bankruptcy. The judgment in question does not come within this definition. To hold otherwise would, as it seems to me, amount to a practical discharge of the bank from its liability for a violation of the usury law. Its claim against the bankrupt's estate is certainly not worth its face, and probably worth little or nothing. Let us suppose a case where the assets are exhausted, and the estate is worthless. If such is not the fact in this case, it may

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be in the next one, and so the illustration will serve to test the correctness of the construction contended for. In such a case we should be called upon to order that the party guilty of usury, and liable for a penalty therefor, should relieve himself from such liability by crediting the amount of the penalty upon a worthless claim against a bankrupt estate. That would be to defeat the evident purpose of the law. I am of the opinion that the bank must pay the judgment obtained by the plaintiff as assignee. Its share of the proceeds of the judgment will go to the satisfaction of its claim, but no more. The money, when collected, must be distributed *pro rata* among creditors.

The demurrer to the bill is overruled, and if the defendant stands upon its demurrer there will be decree for plaintiff, reversing the order of the district court, and directing proceedings in accordance with this opinion.

ATLANTIC & PACIFIC TELEGRAPH COMPANY v. UNION PACIFIC RAILWAY COMPANY and another.

(District of Nebraska. —, 1890.)

CORPORATION — CONTRACT — *ULTRA VIRES* — INJUNCTION. — Although a contract may have been *ultra vires*, a court of equity will restrain a corporation from recovering possession of property which has passed thereunder without due process of law and a return of the consideration paid.

Motion for injunction.

MCCRARY, *Circuit Judge*. — By an act of congress, approved July 1, 1862, and acts amendatory thereof, the Union Pacific Railroad Company was created a corporation with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances," from the Missouri river through Nebraska and Wyoming to a junction

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with the Central Pacific Railroad in Utah. Under this authority the said railroad company built, and early in 1869 completed its railroad and telegraph over said route. The plaintiff is a corporation organized under the laws of the state of New York.

On the first day of September, 1869, the plaintiff and said Union Pacific Railroad Company entered into a contract whereby, among other things, the railroad company agreed to demise and lease to plaintiff "all its telegraph lines, wires, poles, instruments, offices, and all other property by it possessed appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraphic business; to have and to hold for and during the whole term of the charter of the party of the first part (the railroad company) and any renewals thereof, subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that the plaintiff would faithfully and fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States."

On the twentieth day of December, 1871, a supplemental agreement was entered into between said parties, by which certain changes were made in the original contract. Among other things, it was provided in said contract that the railroad company should receive from plaintiff in consideration for the same, 17,800 shares of the capital stock of the plaintiff corporation (the Atlantic & Pacific Telegraph Company), which stock the railroad company received and applied to its own use. Said contracts were duly performed on both sides until the twenty-seventh day of February last, when the railroad company assumed of its own motion to rescind the same and to resume possession and control of the property; for which purpose its agents cut the wires running from the general offices of plaintiff for commercial business, at Omaha, and severed said offices from the main line. It is charged in the bill that this was done for the purpose of giving the business of

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said line at Omaha, and all the advantages thereof, to the defendant, the American Union Telegraph Company, a competitor and rival of plaintiff in the business of telegraphing.

The Union Pacific Railroad Company by consolidation with another company has become the Union Pacific Railway Company, by which name it is sued.

The prayer of the bill is, among other things, for an injunction to restrain the defendants from disregarding the two contracts above mentioned, and from interfering with the property covered thereby, except as in said contracts provided, and from preventing the plaintiff from reconnecting the wires so as to restore them to their original condition before the same were cut. On the first of March it was ordered that the application for injunction be heard before me, at chambers, at St. Louis, on the sixth of April, 1880, and in the meantime a preliminary injunction was allowed.

The defendants have answered fully, and numerous affidavits have been filed. Upon the record thus presented counsel have been fully heard, both orally and by printed briefs.

The Union Pacific Railway Company, defendants, admit the cutting of the wires as charged, as well as their purpose to disregard the contracts, and retake the telegraph lines and property; and in justification allege that said contracts were beyond the power of the company to make, contrary to public policy and in violation of the acts of congress chartering the Union Pacific Railroad Company, and that they are therefore void. The question of the validity of these contracts is the first to be considered.

1. The rules by which this question is to be determined are now well settled, at least in the federal courts. They have been clearly stated by the supreme court in the recent case of *Thomas et al. v. The West Jersey R. Co.* (not yet reported). From the opinion in that case, delivered by Mr. Justice MILLER, I make the following extracts as laying down the law by which I must be guided:

“We take the general doctrine to be in this country, though

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there may be exceptional cases and some authorities to the contrary, that the powers of a corporation organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.

* * * * *

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

"That principle is, that where a corporation, like a railroad company, has granted to it, by charter, a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions—which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter and to relieve the grantees of the burden which it imposes,—is a violation of the contract with the state, and is void as against public policy.

"This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice CAMPBELL, in the case of the *York & Maryland Line Railroad Co. v. Winans*, 17 How. 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania, by the legislature of that state. The stock in it was taken by a Maryland corporation, called the Baltimore & Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling-stock.

"In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a

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patent of the defendant in error, Winans, this court said: 'This conclusion (argument) implies that the duties imposed upon the plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the legislature and the community. Important franchises were conferred upon the corporation, to enable it to provide facilities for communication and intercourse required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. *Beman v. Rufford*, 1 Simon, N. S. 550; *Winch v. B. & L. R. Co.* 13 Law and Equity, 506.'

"And in the case of *Black v. Delaware & Raritan Canal Co.* 7 C. E. Green, N. J. Eq. 399, Chancellor ZABRISKIE says: 'It may be considered as settled that a corporation cannot lease or alienate any franchise or any property necessary to perform its obligations and duties to the state without legislative authority.' For this he cites some ten or twelve decided cases in England and this country."

* * * * *

The case in which these propositions of law were announced was this: A New Jersey railroad corporation, without express authority, undertook to lease to another company for twenty years its railroad, with all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls. The contract or lease was confirmed by a vote of the stockholders. The lessor was authorized to cancel the lease upon giving three months notice; but, in that event, was to be liable to pay the damages incurred by the other party by reason of such action. Under this provision, the railroad company ended the contract and resumed possession

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of the leased road. The suit was by the lessee for the damages provided for, and it was held that no recovery could be had because the contract was *ultra vires*. It remains to apply these principles to the case in hand.

2. It is certain that the contracts in question amounted to a lease or alienation by the Union Pacific Railroad Company of property which was necessary to the performance of its obligations and duties to the government and to the public. In my judgment, the act of July 1, 1862, and its amendments, must be construed as chartering the Union Pacific Railroad Company, and devolving upon it, individually and personally, the power and duty of constructing, operating and maintaining a line of telegraph as well as a railroad. This is made manifest by the consideration that the government endowed the corporation with large grants of land and bonds to aid in the construction of these lines, and imposed upon the company the duty of reimbursing the government from the earnings of the road and telegraph line. Section 6, act of 1862. It is also clear from the language of the first section of said act, which empowers the corporation "to lay out, locate, construct, furnish, *maintain and enjoy* a continuous railroad and telegraph, with the appurtenances," that the power conferred was personal and carried with it a duty and an obligation which could not be transferred.

The very same language which authorizes the construction and operation of the telegraph line also authorizes the construction and operation of the railroad, and the property in the one is as necessary to the performance of the public duties of the corporation as that in the other. The charter of the company, with the amendments, considered as a whole, was manifestly intended to create a corporation which should be personally amenable to the government, in the exercise of the powers conferred, and which should, in a *quasi* public capacity, perform the duties imposed, and render an account of its earnings.

The purpose was not to authorize the construction of a line

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either of railroad or telegraph, to be thereafter sold, leased or transferred to other parties, leaving the government to the chances of securing from or through the lessee or vendee its proportion of the earnings. This is made still more clear by the provisions of the act of June 20, 1874, amending the charter, which imposes upon the company and its officers and agents penalties for a failure to operate or use said railroad or telegraph, *so far as the public and the government are concerned*, as one continuous line, and which gives a right of action to any party aggrieved, "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with this act or the acts to which this is amendatory."

I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating and maintaining a line of telegraph for commercial and other purposes, and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be "the demise of their telegraph lines, property and good-will, and of the rights and privileges, in the manner hereinafter specified," etc.; and the property demised by the railroad company is "all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business." The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimated, I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those

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important duties and trusts which it, for a large consideration and for a great public purpose, had undertaken to perform. It certainly could not divest itself of these powers and duties, and devolve them upon the plaintiff, without express authority from congress.

3. But if the contracts in question are not *ultra vires* by reason of the transfer of property necessary to the performance, by the railroad company, of its public duties, they are so because they attempt to transfer certain franchises of the said company. The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by congress upon the railroad company, as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that this feature is alone sufficient to render them in excess of the corporate power of the company.

4. This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to and the subject matter of an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same thing. Many cases hold that a corporation which has made a contract *ultra vires* which has not been fully per-

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formed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that, even in cases at common law, a contract *ultra vires*, made between the corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard*, 55 Ill. 417. And in the case of *Thomas v. R. Co.* (Supreme Court U. S.), already quoted from at length, Mr. Justice MILLER upon this point says: "There can be no question that, in many instances where an invalid contract, which the party to it might have avoided or refused to perform has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler*, 22 N. Y. 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

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The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it (the contract in question) has been executed, namely, the four or five years of action under it, the accounts have been adjusted and *each party has received what he was entitled to by its terms.*"

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding, before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal. It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from

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deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder*, 45 Mo. 505; *Varick v. New York*, 4 Johns. Ch. 53; *Dudley v. Trustees*, 12 B. Mon. 610; *Farmers v. Reno*, 53 Pa. St. 224; *Sunsing v. Steamboat Co.* 7 Johns. Ch. 162.

The principle settled by these and many other cases is, that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

THE CENTRAL BRANCH UNION PACIFIC RAILROAD CO. v. THE
WESTERN UNION TELEGRAPH CO.

(*District of Kansas. May, 1880.*)

1. **CONTRACT—ULTRA VIRES.**—The Central Branch Union Pacific Railroad Company was authorized by act of congress to construct a railroad and telegraph line, as a part of the Union Pacific Railroad system, for one hundred miles west of the Missouri river, upon the same terms and conditions, in all respects, as were provided for the construction of the railroad and telegraph line of the Union Pacific Railroad Company. *Held*, that a contract by such railroad with a telegraph company, whereby

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it divested itself of the right to manage and control the telegraph line and fix rates thereon, was *ultra vires* and void.

NOTE.—*Atlantic & Pacific Telegraph Co. v. Union Pacific R'y Co.* ante, p. 541, followed.

2. SAME—SAME—RESTITUTION OF PROPERTY.—Where the railroad retook possession of such telegraph line, accompanied with legal proceedings to have the contract declared null and an account taken, the telegraph company cannot compel a restitution of the property under the contract pending such proceedings.

In equity. Motion to dissolve injunction.

Everest & Waggener, for complainant.

W. C. Webb, Peck, Ryan & Johnson, Karnes & Ess, Williams & Thompson and *C. Beckwith*, for defendant.

FOSTER, *District Judge*.—The plaintiff filed its bill on the twenty-seventh day of February last, in the state court, setting forth its corporation, and its franchises granted under the act of congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862, by which it was authorized to construct a railroad and telegraph line, as a part of the Union Pacific Railroad system, for one hundred miles west of the Missouri river; that it did construct its railroad under the provisions of that act, and did enter into a contract, in 1867, with the defendant, the Western Union Telegraph Company, by which contract the plaintiff was to construct its telegraph line aforesaid by erecting the poles, putting on the insulators and one wire, and the defendant was to furnish a main battery at Atchison, and instruments along the line for working the same, not to exceed twelve in number, and the defendant was to control said telegraph line, fix tariff of rates, and keep said line in repair; the plaintiff furnishing the operators, and paying the proceeds of the business to the defendant.

The railroad business was to be done without charge, except

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the eastern business in excess of \$1,200 per annum, which excess was to be at half rates; the defendant having the right to string another wire on said line at its own expense, which it has since done.

The bill further alleges that said contract is null and void, being beyond its power to make, and in contravention of its rights and duties to the government and the public, under the said act of congress, and the amendments thereto, and states that it has taken and is in peaceable possession of its said line of telegraph, and praying an injunction against the defendant; that it be enjoined from taking possession, or interfering with plaintiff's possession, thereof, and that said contract be declared void, and that an account be taken between the said parties, etc.

On this showing Judge OTIS, of the second district, granted a temporary injunction or restraining order, and thereafter the defendant removed the cause to this court, and now moves for a dissolution of said injunction.

For the purposes of this motion it is not my intention to discuss any points of law fairly decided by Judge McCRAEY in the Omaha case (*Atl. & Pacific Tel. Co. v. Union Pacific Tel. Co.*, ante, p. 541), but shall attempt to apply that decision, so far as practicable, to the facts in this case. Under the thirteenth section of the act of July 1, 1862, this company, plaintiff, was granted the right to build one hundred miles of railroad and telegraph west of the Missouri river, *upon the same terms and conditions*, in all respects, as were provided for the construction of the railroad and telegraph line of the Union Pacific Railroad Company. So it will be seen that the rights, privileges and duties of the plaintiff company were identical with those of the Union Pacific Company.

Now, Judge McCRAEY has held that the contract by which the last named company leased its telegraph line to the Atlantic & Pacific Telegraph Company, and divested itself of the right to manage and control the same, and fix rates thereon, was *ultra vires* and illegal.

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He says, after citing the decision of the supreme court in *Thomas v. West Jersey Railroad Co.*:

"In my judgment the act of July 1, 1862, and its amendments, must be construed as chartering the Union Pacific Railroad Company, and devolving upon it *individually* and *personally* the power and duty of constructing, operating and maintaining a line of telegraph as well as a railroad. * * * The power conferred was *personal*, and carried with it a duty and obligation which could not be transferred."

This reasoning is equally applicable to this case, as the plaintiff stands on an equal footing in all respects with the Union Pacific Company, and for this motion I shall adopt Judge McCRAE's construction of these contracts. This contract being void, had the railroad company in this case the right to repossess itself of the telegraph line, and exclude the defendant therefrom, without process of law?

In the Omaha case the circuit judge held that that company could not. The seizure of property from the possession of another, even though the title and right of possession be in the taker, at so early an hour as two o'clock in the morning — as was the case there — is not calculated to create the most favorable impression on a court of equity, and it raises a doubt whether such proceedings are prompted solely by a quickened conscience of duty to the government or the public, especially when that conscience has suddenly awakened from a Rip Van Winkle sleep of thirteen years.

It is contended by the defendant, with much force, that even though this contract be void, the plaintiff had no legal or equitable right to take possession of the property, against defendant's consent, without legal proceedings, and the more so as a part of the property taken, to wit, twelve instruments and one wire, were, at least, the sole property of the defendant.

If I were passing upon the legality of this contract as an original question, and had any doubt of its invalidity, I should follow this rule as the most equitable and the safest, until a

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final hearing on the merits could be had. My understanding of the law is this: If this contract is *ultra vires* the railroad company, or is against public policy, it is absolutely void, and, so far as it is executory, neither party can maintain an action against the other for its breach. Nor can either party bring it forward to sustain or defeat a right of possession of property obtained under it, and if it involves any moral delinquency or turpitude, as *contra bonos mores*, the parties being *in pari delicto*, the courts must leave them just where it finds them, and neither party has any standing in court for legal or equitable relief. *Thomas v. City of Richmond*, 12 Wall. 349, 354; *Chitty on Contracts* (10th Am. ed.), 709-732; *Roll v. Roquet*, 4 Ohio, 400, 419; *Moore v. Adams*, 8 Ohio, 372; *Dixon v. Olmstead*, 9 Vt. 310; *Footte v. Emmerson*, 10 Vt. 338; *Buck v. Albee*, 26 Vt. 184; *U. S. Bank v. Owens*, 2 Pet. 527, 538.

There is, however, a distinction made where the contract was in no respect immoral, or merely *malum prohibitum*. In such cases the courts have inquired into the relative delinquency of the parties, and administered justice between them. *Thomas v. Richmond*, *supra*; *Lowell v. Railroad Co.*, 23 Pick. 32.

But that is not the relief the defendant is seeking here. It is asking an enforcement of the contract. It is true, in the Omaha case Judge McCREARY ordered the property placed back into the possession of the telegraph company until an accounting should be had between the parties. In that case the railroad company had received stock of the telegraph company of the value of \$150,000, and the railroad company had taken no legal proceedings to have the contract annulled, nor offered to account with the telegraph company, or return the consideration received.

It appeared equitable that it should account for what it had received, and under the equities of the case the judge made the order of restitution.

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The facts in this case are quite different. At the same time the plaintiff took possession of the line, which was done by removing the pins in the switch board of the Atchison office, and thus disconnecting the defendant's wire, it filed its bill, asking that the contract be decreed null and void, and praying that an account be taken of the dealings between the parties. The property of the defendant taken by the plaintiff, and which it offers to return or account for, was not, comparatively speaking, of great value, and was so connected with the plaintiff's property as to make it impossible to interfere with the one without affecting the other. There is another difficulty in this case: Under the contract all the operators on this line are the employes of the railroad company, and the offices or stations belong to that company. Now, a dissolution of this injunction, and granting another in favor of the defendant, might nominally restore the defendant's connection over this line of telegraph; but what practical benefit would that be to the defendant unless the employes of the railroad company could be compelled to work the line, or the defendant company be permitted to place operators in the stations of the railroad company to operate the wires?

This question involves largely the right of the defendant to have a decree for the specific performance of the contract.

Is this a case in which a specific performance could be had if the contract was legal? To say the least, it would be very doubtful. *Marble Co. v. Ripley*, 10 Wall. 339, 358-9; *Railroad Co. v. Railroad Co.*, 13 Ohio St. 544.

In brief, this contract being absolutely void, and the plaintiff having taken peaceable possession of the property, accompanied with legal proceedings to have the contract declared null, and for an account to be taken between the parties, in my judgment the defendant cannot compel a restitution of the property under the contract pending the proceedings.

The temporary injunction may be continued until the session of court.

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And on May 8 the following order was entered in said case:
*In the Circuit Court of the United States for the District of
Kansas.*

THE CENTRAL BRANCH UNION PACIFIC RAILROAD COMPANY
(otherwise known as the Atchison & Pike's Peak Railroad
Company) *v.* **THE WESTERN UNION TELEGRAPH COMPANY.**

AT CHAMBERS,
TOPEKA, KANSAS, May 8, 1880.

Now comes the Central Branch Union Pacific Railroad Company, by J. P. Usher, and Everest & Waggener, its solicitors, and the Western Union Telegraph Company, by W. C. Webb, George R. Peck, and Tomlinson & Griffin, its solicitors, and thereupon came on to be heard the motion of the defendant, the Western Union Telegraph Company, to vacate, set aside, and dissolve the temporary restraining order, granted herein on the twenty-seventh day of February, 1880, upon consideration whereof it is ordered by the court that said motion be and the same is hereby denied and overruled. And it is further ordered that the said temporary restraining order granted herein on the twenty-seventh day of February, 1880, be and the same is hereby continued in full force and effect until the regular term of this court, commencing at Leavenworth, in said district, on Monday, the seventh day of June, 1880, and until the further order of the court.

The motion of the defendant, Western Union Telegraph Company, for temporary injunction, came on to be heard, and was argued by counsel, on consideration whereof it is ordered that said motion be and the same is hereby denied and overruled.

C. G. FOSTER, Judge.

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THE WESTERN UNION TELEGRAPH COMPANY v. THE UNION
PACIFIC RAILWAY COMPANY and others.

(District of Kansas. July, 1880.)

1. CORPORATION—POWER TO ASSIGN FRANCHISE UNDER ACT OF CONGRESS OF JULY 2, 1864.—The United States Telegraph Company had power to assign and transfer to plaintiff its right, derived from act of congress of July 2, 1864, to construct a line of telegraph along the line of the Kansas Pacific Railroad, and the amended bill shows that such assignment was duly executed.
2. ILLEGAL CONTRACT DOES NOT AFFECT PREVIOUSLY ACQUIRED INTEREST IN SAME PROPERTY.—Where, prior to October 1, 1866, the plaintiff had acquired an interest in the telegraph line and property in controversy, that interest was not affected by a contract made on that day for a lease of the line, even though that contract be held void.
3. SAME—PROPERTY ACQUIRED UNDER AN ILLEGAL CONTRACT.—Even if the contract of October 1, 1866, is held void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract; following *Planters' Bank v. Union Bank*, 16 Wall. 483, and *Brooks v. Martin*, 2 Wall. 70.
4. SAME—RIGHTS SO ACQUIRED WILL BE PROTECTED.—It is therefore held, independently of the question of the validity of the said contract, that the plaintiff has, according to the allegations of the amended bill, an interest in the property in dispute which a court of equity will protect, and defendants have not the right to seize it by force and without process.
5. SPECIFIC PERFORMANCE—INJUNCTION.—That although a court of equity will not decree the specific performance of a contract requiring continuous duties, involving the exercise of personal labor and cultivated judgment, yet the violation of such a contract may be enjoined.
6. PAROL AGREEMENT TO MODIFY WRITTEN CONTRACT.—The question of the validity and effect of the parol agreement, set out in the amended bill, to annul and abrogate the vicious clause in the written contract of October 1, 1866, is reserved for further argument and future determination.

In equity. Demurrer to amended bill.

C. Beckwith, Williams & Thompson and *Geo. R. Peck*, for complainants.

J. P. Usher, A. C. Williams and *Everest & Waggener*, for respondents.

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MCCRARY, *Circuit Judge*.—The demurrer to the original bill having been sustained on the ground of the immorality of a material part of the contract,¹ set out and made the sole basis of the relief sought, the plaintiff filed an amended bill, which is now before me for consideration; counsel having agreed that the motion to dissolve the injunction shall be regarded as a general demurrer to the amended bill. The part of the contract held vicious is the clause providing for the transmission free of charge of private, social and family messages of the executive officers of the railway company.

The amended bill makes certain averments, intended to show the right of plaintiff to recover, notwithstanding the insertion of this vicious clause in the original contract.

The question to be determined is the sufficiency of these averments, or of any of them, to entitle plaintiff to the relief sought.

1. The plaintiff now claims that it is rightfully in possession of the right of way, and of the telegraph line in question, by virtue of the provisions of the act of congress of July 2, 1864, entitled "An act for increased facilities of telegraph communication between the Atlantic and Pacific states, and the territory of Idaho." I had occasion to comment upon this act in my opinion upon the demurrer to the original bill, and the conclusion reached was that the act was intended to authorize the United States Telegraph Company, either with or without the consent of the railway company, to construct and operate a line of telegraph along and upon the right of way of the railway company. Whether this right was assigned and transferred to the present plaintiff by a valid contract, was not considered, and that question is now to be determined. The allegations of the amended bill, being admitted, sufficiently show that the United States Telegraph Company had, by virtue of the laws of New York, by which it was created, a right to make an assignment and transfer of all its franchises and property to another telegraph company.

¹ See *ante*.

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Counsel for respondents insist, however, that this right was not recognized by the above-mentioned act of congress, of July 2, 1864, and that by that act the United States Telegraph Company, and that company alone, was authorized to construct its telegraph along the line of the railway. It is said that this was a personal privilege granted to that company, and that, therefore, it could not assign it. Ordinarily, when property, or rights of any kind, are acquired by a corporation, they are to be enjoyed or disposed of in any manner not inconsistent with the law of its being. Unless, therefore, there is something in the act of congress to indicate a different purpose, it must be presumed that the right to remove its line to the railway, and to operate it there, was given to the United States Telegraph Company, to be enjoyed or disposed of under its charter as its other property and rights. By reference to the act of congress it will be seen that nothing is said about the assignment of the rights conferred upon the United States Telegraph Company. The transfer of those rights is neither authorized nor prohibited in terms. We must, therefore, consider the spirit and the purpose of the act to ascertain whether it was the intent of congress to confine the privilege to that company, and to prohibit its transfer. There is nothing to indicate any intent to require the construction of the telegraph line by the United States Company. The evident purpose of the act was to save that company from pecuniary loss by reason of the construction of a rival line by the railway company. It was intended to confer a favor upon the telegraph company by placing it in a position to protect itself from the ruinous competition likely to be established by the construction of another line of telegraph under the Pacific Railway acts. This purpose was more effectually accomplished by leaving its charter right to assign its franchises and transfer its property unrepealed. I am therefore of the opinion that the United States Telegraph Company was authorized to assign the rights conferred upon it by the act of July 2, 1864.

I am also of the opinion that the amended bill, taken as

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true, shows a transfer of those rights to the plaintiff. It follows from this that the plaintiff has rights in respect to the lines in controversy which a court of equity should protect, independently of the contract of October 1, 1866. It was not a trespasser upon the right of way of the railway company. Without a contract it had a right to go there and construct its lines; and, having expended its means with the consent of the railway company in constructing the existing line, the defendants must not take possession of it by force, and without making compensation. It is not material to determine whether the right of way along the railway, and over its right of way, was also granted by the act of July 24, 1866, for if so, no additional rights were conferred. As to a part of the line, the right of the plaintiff outside of the contract is, according to the allegations of the amended bill, very clear. It is averred that prior to 1865 the United States Telegraph Company, with the assent of the railway company, entered upon the right of way of the last-named company west of Lawrence, as it had a right to do under the act of congress of July 2, 1864, and that in the year 1865, under said right to enter upon said right of way, and construct and operate such line of telegraph, it had constructed a line of telegraph from Lawrence to Fort Riley, a distance of ninety-seven miles, and had also entered into a contract for the construction and delivery to it of a line of telegraph from Leavenworth to Lawrence, and for the residue of the line between Fort Riley and Denver; such lines to be constructed and ready for operation as fast as said railroad should be constructed. It is further averred that said United States Telegraph Company proceeded in the construction of said line of telegraph, until 1866, without objection on the part of the railway company, and was, in 1866, in possession of a line of telegraph from Lawrence to Fort Riley, and was engaged in operating the same, and was engaged in constructing the residue of its line between the mouth of the Kansas river and Denver, and between Lawrence and Leavenworth, and had collected a considerable amount of material therefor. The

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rights and property here described existed in the United States Company, and were assigned to the plaintiff prior to the execution of the contract of October 1, 1866, and they were, in my view, vested in the plaintiff prior to, and independently of, the contract. Should the contract be held void, an accounting between the parties would, nevertheless, be necessary, in order to determine their rights with respect to the line of which the property here mentioned and described constitutes an important part.

2. There is another ground upon which I should feel constrained to hold that the plaintiff has, by the amended bill, shown an interest in the telegraph lines and property in controversy which a court of equity should protect. Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. Such is the doctrine established by the supreme court of the United States. The case of *Planters' Bank v. Union Bank*, 16 Wall. 483, was a suit to recover money received for the sale of confederate bonds. In the course of the opinion Mr. Justice Strong said: "It may be that no action would lie against a purchaser of the bonds, or against the defendants, on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties them-

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selves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transactions to discover its origin." Id. 499, 500.

And see the following cases cited and approved by Justice STRONG in his opinion: *Falkney v. Reynolds*, 4 Burrows, 66 (2069); *Petrie v. Hannay*, 3 Term, 418, 419; *Lestapies v. Ingraham*, 5 Barr, 71; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbs*, 17 How. 232, 236; *Brooks v. Martin*, 2 Wall. 70.

In *Brooks v. Martin* it was held, upon full consideration, that after a partnership transaction, confessedly in violation of an act of congress, has been carried out, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. All of these cases admit the invalidity of a contract bottomed in immorality or in a violation of a statute, and they all agree that where a party comes into court and asks relief upon such a contract, it must be denied. But they make a distinction between those cases in which a court is asked to enforce such a contract, and those in which a court is asked to deal with property which has been acquired as the result of the execution thereof. Such property may constitute the subject matter of a suit at law or in equity, notwithstanding the invalidity of the contract under which it was acquired. Applying this doctrine to the case in hand, we find, according to the allegations of the amended bill, that besides the property acquired by plaintiff from the United States Telegraph Company (and which became and is a part of the line), the plaintiff has expended upon said line over one hundred thousand dollars in excess of the contributions made by the railway company under the contract.

The fact seems to be that, by expenditures made by the plaintiff, and by contributions from the railway company, the line has been constructed, reconstructed, and maintained.

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If the contract were set aside, it would, I think, leave the parties joint owners of the property, and a case for equity jurisdiction, in the adjustment and settlement of their respective interests, would be presented.

3. I reserve for further consideration hereafter the question of the effect of the parol agreement set out in the amended bill, by which the parties, as is alleged, contracted with each other to abrogate, annul, set aside, and expunge from said contract the clause providing for the transmission of private, social and family messages of the executive officers of the railway company free of charge. Whether said agreement was made upon sufficient consideration; whether, if valid, it left the entire contract in parol; and whether, if so, the unexecuted portion is void under the statute of frauds,—are all important questions, which may become very material in the further progress of the cause. In the view I have taken of other questions, it is not necessary now to decide these, and I leave them open for further argument and future determination.

4. It is insisted by counsel for defendants that the contract set out in the bill (assuming its validity) is one which requires the performance of continuous duties, involving the exercise of skill, personal labor, and cultivated judgment; and that, therefore, a court of equity will neither decree its specific performance nor enjoin its violation. That the contract is in its nature incapable of being enforced by a decree for specific performance is very clear (*Marble Co. v. Ripley*, 10 Wall. 339); but it does not follow that a party to such a contract can have no injunction to restrain its breach. It is now settled, I think, by the decided weight of authority, that in such cases, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. *Pomeroy on Specific Performance*, §§ 24, 25, 310, 311 and 312, and cases cited. If, therefore, the contract shall be finally held valid by reason of the elimination of the vicious clause, or on any other ground, it will follow that the injunction was properly granted.

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If it should be held that the contract is void, it will still, in my judgment, follow that the defendant should be restrained from taking possession of the property accumulated, under the circumstances stated in the amended bill, until an accounting and settlement can be had.

The demurrer to the amended bill is overruled. Defendants may answer if they see fit. If they stand upon their demurrer, there will be a decree continuing the injunction in force until final decree settling the respective rights of the parties can be had. *State of Georgia v. Bruelesford*, 2 Dall. 406, 408.

THE WESTERN UNION TELEGRAPH COMPANY v. THE ST.
JOSEPH & WESTERN RAILWAY COMPANY and others.

(District of Kansas. July, 1880.)

1. ILLEGAL CONTRACT — REMEDY — INJUNCTION. — A court of equity will enjoin the seizure of property and the ejectment of the possessor, although the same may have been acquired under an illegal contract, until an application has been made for the cancellation of such contract, and a full and fair settlement of all accounts growing out of its execution in the past.
2. CORPORATION — RATIFICATION. — A corporation, like an individual, may ratify by its acts the terms of a contract by which it would not, without such ratification, be bound.
3. CONTRACT — SPECIFIC PERFORMANCE — INJUNCTION. — Although specific performance of a contract requiring the performance of continuous duties will not be enforced, a court of equity will, nevertheless, enjoin its violation.

In equity. Demurrer to bill.

Woodson & Crosby, W. C. Webb, Peck, Ryan & Johnson, Karnes & Ess, Williams & Thompson and C. Beckwith, for complainant.

John Doniphan and Everest & Waggener, for defendants.

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McCREARY, Circuit Judge. — This case has been argued and submitted upon demurrer to the bill. The material facts, as they are stated in the bill, are as follows:

1. On the tenth day of August, 1871, the Western Union Telegraph Company, and the St. Joseph & Denver City Railroad Company, entered into a written contract, whereby, upon certain terms and conditions, a line of telegraph was to be constructed, maintained and operated along the line of said railroad. Each company was to contribute, as specified in the contract, certain material and service in the construction, maintenance and operation of the line.

2. The railroad company agreed to give the telegraph company the exclusive right of way, on and along the line of the road, for the construction and use of a telegraph line for public and commercial business.

3. Provisions were made for transacting the telegraph business of the railroad company by the telegraph company.

4. The agreement was to continue in force for the term of twenty-five years from the tenth of August, 1871.

5. In pursuance of the contract, and in full reliance upon its legality, and the good faith of the railroad company in making it, the plaintiff has erected and maintained, at great cost and expense, a line of telegraph along the line of the railroad, consisting of two wires, one extending from Elwood, in Kansas, and St. Joseph, Missouri, to Hastings, Nebraska, and the other from the same points to Hanover, in Kansas.

6. The said railroad company constructed its railroad from a point opposite the city of St. Joseph, Missouri, although the charter was for a railroad from Elwood, Kansas, westwardly to a junction with the Union Pacific Railroad, or any branch thereof; and it was expressly understood and agreed between plaintiff and said railroad company, at the time the contract was entered into, that the plaintiff was to operate, maintain and establish its telegraph along the line of the railroad, from St. Joseph, through Elwood, Kansas, and the line was so erected, and has been so maintained and operated.

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7. Certain mortgages executed by the said St. Joseph & Denver City Railroad Company were duly foreclosed, and under decree of foreclosure thereof all the land, property, rights and franchises of said company were duly sold and conveyed to persons representing the holders and owners of the mortgage debts. In 1875 the purchasers, and those for whose benefit they purchased, took possession of the entire line from St. Joseph to Hastings. Afterwards the St. Joseph & Western Railroad Company was organized, and all the property, rights and franchises of the old company were sold and conveyed to it.

8. Since the purchase by said last-named company (defendant herein) it has been using and operating the railroad, and has fully ratified, sanctioned and confirmed the contract made and entered into between the plaintiff and St. Joseph & Denver City Railroad Company, and received and enjoyed all the benefits and advantages of said contract that had been received and enjoyed by the St. Joseph & Denver City Railroad Company down to the time the new corporation, now owning and controlling the same, was formed.

9. The defendants have combined and confederated together for the purpose of defrauding the plaintiff of said line of telegraph, and of the property and wires connected therewith, and did, about the twenty-seventh of February, 1880, unlawfully and with force seize the telegraph line at a point in Doniphan county, Kansas, etc., and did forcibly deprive plaintiff of all possession, benefit and control, of said telegraph wires and batteries, etc.

The prayer is for an injunction to restrain defendants from preventing plaintiff reconnecting the wires that have been cut and severed as aforesaid, and restoring the connection which has been severed, and from preventing the plaintiff from using the said line and wires, and enjoying all the benefits to which plaintiff is entitled under said contract of August 10, 1871, and from interfering with plaintiff in the use of said telegraph and wires, and from the exercise of rights heretofore claimed and exercised under said contract.

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Prior to the removal of this cause from the state court an injunction was granted. The defendants demur, and also move to dissolve the injunction. It will be sufficient, for the present, to consider the case upon the demurrer.

1. It is said that the charter of the St. Joseph & Denver City Railroad Company expired by law in 1877, and, inasmuch as the contract was to run for twenty-five years, or until 1896, it was beyond the power of the corporation, and void. It is not necessary to determine the question whether such a contract is void *in toto*, or only void as to that part of the contract which, by its terms, is to be performed after the expiration of the charter, because, in so far as it has been executed, the parties are bound, and rights may have accrued that a court of equity will enforce. The contract was entered into; it is not tainted with moral turpitude; under it a line of telegraph has been built and operated, and a valuable business has been created; for about nine years it has been recognized and executed. Under these circumstances it is not the province of either party to declare the contract void, and assume, without process and without a settlement, to seize the lines and property.

2. It is insisted that by the foreclosure sale of 1875, to the new company, they acquired all the rights the old company had in the wires along the line; that the new company took them freed from any claim of plaintiff under the contract, and is not bound by it. This claim is fully met by the allegations in the bill, which is admitted by the demurrer, that the new company, since its purchase, has fully ratified, sanctioned and confirmed the contract, "and that it has received all the benefits and advantages of said contract that had been received and enjoyed" by the old company. If this allegation is true, it must follow that the new company is at least so far bound by the terms of the contract as to be obliged to submit to an accounting and settlement with the plaintiff before it can take possession of the wires and eject the plaintiff therefrom. A corporation, like an individual, may ratify, by its acts, the terms of a contract by which it would not without such ratification be bound.

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3. It is also insisted that the plaintiff is not entitled to relief, because of the clause in the contract which gives the plaintiff the exclusive privilege of constructing and operating a line of telegraph along the line of the railroad.

I have little doubt that the clause here referred to is void; and should any telegraph company desire to erect another line along the railroad, I do not think the plaintiff could be heard to object. *Western Union Telegraph Company v. American Union Telegraph Company*, Supreme Court of Georgia, 1880.

But that clause does not vitiate the entire contract, as between the parties; much less does it preclude the plaintiff from seeking the aid of a court of equity to protect rights acquired under it, and growing out of its execution in the past.

4. It is said that the contract requires the performance of continuous duties, and therefore specific performance will not be decreed. This is true, but a court of equity may, nevertheless, enjoin its violation. *Pomeroy on Specific Performance*, §§ 24, 25, 310, 311 and 312.

5. I am not prepared at present to decide that the defendants may not be able to show that the contract in question ought to be cancelled by decree of this court; that is a question which can only be determined upon final hearing. In cases of this character, where the contract requires continuous service for a series of years, and where the parties disagree, even if the contract is not absolutely void, a court of equity may decree a dissolution of the relations between them, upon a full settlement of their accounts, and payment of any balances.

What I wish to emphasize in this case, as well as in other similar cases, is that the defendants have no right to take their remedy into their own hands. If they have the right to seize this property by force, upon the ground that they hold the contract void, according to the same reasoning the plaintiff would have the right to adjudge the contract valid, and by force retake the property. In other words, force and violence would take the place of law, and mobs would be sub-

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stituted for the process of courts of justice. The strongest litigant, the one commanding the largest force of men and the most money, would succeed.

Such a doctrine, if recognized by the courts as a proper mode of adjusting disputes concerning property rights, would lead at once to anarchy.

If the defendants, after years of acquiescence in the contract in question, after receiving its benefits, and after a property had been built up under it to which others made claim, became suddenly convinced that it was a void contract, it was their duty to apply to the courts for relief, praying a cancellation of the contract, and a full and fair settlement of all accounts growing out of its execution in the past.

Until they seek some such remedy, and until a fair settlement upon full accounting can be had, they will be enjoined from attempting to eject the plaintiff, or to seize the property.

The demurrer to the bill is overruled.

HERRING, Assignee, etc., v. RICHARDS and others.

(*District of Minnesota.* February, 1880.)

1. VOLUNTARY CONVEYANCE—PARENT AND CHILD—FRAUD.—A voluntary conveyance from a parent to his children, by way of settlement, while solvent and free from debt, and not disproportionate to his means, will be sustained as against subsequent creditors, in the absence of fraud.
2. SAME—SUBSEQUENT IMPROVEMENTS—FRAUD.—Subsequent contributions of money, for the purpose of paying off incumbrances and improving the property, will not render such conveyance void.
3. SAME—PRESUMPTION OF ACCEPTANCE.—In the absence of direct testimony the acceptance of the grant will be presumed, after the expiration of four years, where the grantees held, owned, controlled and managed the property from the time of the conveyance, and the only occupancy had been by their tenants, and for their sole and exclusive use.
4. DEED—DELIVERY TO RECORDER.—Where a deed is delivered by the grantor to the recorder for record, the acceptance of the grantee will be presumed in the absence of proof, if the grant be beneficial to him.

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5. **SAME—SAME—ACCEPTANCE.**—And a subsequent acceptance will relate back to the date of the conveyance except as against intervening attachment or execution creditors.

H. P. Herring, for plaintiff.

George B. Young, for defendant.

NELSON, *District Judge*.—This suit is brought to recover certain real property alleged to have been conveyed in fraud of creditors.

On August 12, 1874, William Richards purchased of Aaron S. Everest and wife the property in controversy, and received a deed therefor, which was recorded August 15, 1874. The purchase price was \$2,000, and Richards paid \$200 in cash, and gave his notes and a mortgage to secure the balance of the purchase money. The notes were four in number, viz.: One for \$300, due August 12, 1875; one for \$500, due August 12, 1876; one for \$500, due August 12, 1877; one for \$500, due August 12, 1878.

On August 14, 1874, Richards conveyed the farm for a consideration, expressed in the deed, of \$200, to his daughters, Minnie Richards and Mary Vine Richards, now Mary Vine French, wife of the defendant Lafayette French. It is admitted this conveyance was voluntary, and subject to the mortgage.

At the time of this conveyance to the children, Richards was engaged in the lumbering business, owning an interest in lumber yards at Austin and Minneapolis, and connected with Bray & French and his son William A. Richards, and subsequently with Bray, Wilder & Co., the successors of Richards, Bray & French at Minneapolis. The aggregate interest of Richards in the business was sworn to by competent witnesses as amounting to over \$7,000; and at that time Richards also owned real estate in Austin, valued at over \$8,000, out of which there was a rental, in 1874, of \$1,455, and a trifle less in 1875 and 1876, and on which was an incumbrance of only \$500. Richards' profits or income for 1874 amounted to \$2,436.15, from his lumber trade, in addition to the rental above stated. He owed some debts in his business, but his property interest

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was fairly worth, according to the balance sheet and other testimony, \$8,000 in the lumber business, over and above his liabilities, and \$8,000 in real estate at Austin, incumbered to the amount of \$500.

There is no evidence that Richards' estate was less during the year 1874, but it was ascertained on January 1, 1876, that he had lost, during the year 1875, about \$6,000; and heavy losses following, he became insolvent, and in October, 1877, was adjudged a bankrupt.

The assignee insists that the conveyance to his children by Richards was in fraud of subsequent creditors. The land conveyed was subject to the mortgage to secure \$1,800, the balance of the purchase price agreed to be paid Everest, and at the time of Richards' bankruptcy all but the last note of \$500 had been paid. The land was improved every year by plowing and breaking up additional acres, fencing, etc., and it is urged that the testimony shows the money expended in improvements belonged to the bankrupt Richards. I do not find such to be the case. An analysis of the evidence shows the following amount of money was laid out in improvements and necessary expenses, and the sources from which it came.

ANALYSIS OF PAYMENTS EACH YEAR, SHOWING BY WHOM MADE.

1874-5 — Total expended on farm	\$1,346 49		
Furnished by Mrs. Richards...	649 81		
Paid by Richards	\$696 68	\$696 68	
Received by Richards from farm			\$341 50
1876 — Total expended on farm	2,844 46		
Furnished by Mrs. Richards	467 83		
Furnished by Richards.....	\$1,876 63	1,876 63	
Received by Richards from farm.			2,281 00
1877 — Expended on farm .. \$1,875 64 }		1,875 64	2,777 97
Received from farm . 2,777 97 }			
		<u>\$4,448 95</u>	<u>\$5,400 47</u>
In 1874-5 Richards laid out.....	\$696 68		
Richards received	341 50		
Farm debtor to Richards.....	\$355 18	\$355 18	

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In 1876 Richards laid out.....	\$1,876 63	
Richards received	2,281 00	
Richards debtor to farm	\$404 37	\$404 37
In 1877 Richards laid out.....	1,875 64	
Richards received	277 97	
Richards debtor to farm	\$902 33	902 33
Balance Richards debtor to farm.	951 52	
	<u>\$1,806 70</u>	<u>\$1,806 70</u>

MONEY AND LUMBER FURNISHED FOR FARM BY MRS. RICHARDS,
OUT OF HER SEPARATE PROPERTY.

1875 — July 6. Money to pay Everest on \$300 note.....	\$331 25
Sept 9. Lumber, \$185.58; cash, \$95.43.....	281 01
20. Cash to pay Cochran.....	87 55
Total in 1875.....	<u>\$649 81</u>
1876 — March 11. Lumber for stable.....	114 66
18. Paid for nails, \$6.50; barley, \$36.....	43 50
24. Paid seed wheat.....	204 30
28. Paid red-top seed and clover seed.....	12 57
31. For work in building stable.....	40 00
June 9. Lumber.....	53 80
Total in 1876.....	<u>\$467 83</u>
Add amount in 1875, as above.....	649 81
Total amount paid by Mrs. Richards.....	<u>\$1,117 64</u>

FARM ACCOUNT, 1877.

	<i>Dr.</i>	<i>Cr.</i>
April. Expenses putting in crop — Paid Wm. Way, Vincent & Gallagher, and Norwegian and team, as per time book	\$120 12	
July 19, and part of August. For harvesting and stacking, to Wm. Way, superintending..	50 00	
Aug. 23. J. Frost and J. Owens and hands	78 00	
Dickinson and teams	25 00	
For wire.....	50 50	
Paid for threshing 2,792 bushels wheat..	139 60	
Paid for help, by order from Wm. Way, as per time book —		
For teams	49 50	
Men to help threshing.....	41 25	
31. Paid Everest two notes and interest, at Mower County Bank	1,126 67	

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Nov. 1.	Wm. Way and teams, plowing 180 acres	\$195 00	
July 23.	Sold 10 tons hay, @ \$5.....		\$50 00
Aug. 24.	Sold 2,807½ bushels wheat, @ 88 cents..		2,470 60
	Hay—seven tons to Decker		35 00
Sept. 12.	Hay—18 tons in stack		65 00
Oct. 30.	174 bushels wheat, @ 88½ cents, from land worked by O. Smith on shares...		157 37
		<u>\$1,875 64</u>	<u>\$2,777 97</u>

It appears from the foregoing schedule, which is sustained by the evidence, that the notes given by Richards in part payment of the property were not paid by him out of money belonging to his estate, but by Mrs. Richards, out of her own money and the proceeds of the farm.

It appears that a small amount, in addition to the first payment of \$200, made by Richards, was laid out by him upon the farm, but I do not think the sum can be regarded so large a settlement upon his children as to make void the conveyance. If it was made in good faith, with no intent to defraud creditors, it will not be set aside, when it is in proof that at the time Richards made it he possessed ample means to pay his debts, unless the business in which he was engaged, or intended to engage, was so hazardous, and required such large pecuniary liability, that he could not reasonably believe the gift would not imperil his ability to meet his debts, to be contracted in the future.

It is not proved such was the case. The conveyance was openly made, and the deed was recorded, and subsequent creditors had notice that the property was in the name of the children. They cannot be heard to say that credit was given Richards on the strength of his ownership of this land. If the conveyance had been secret, concealed from creditors, and the amount of the gift impaired the ability of Richards to pay, the creditors might complain.

I think it is proven that the gift was accepted by the daughters, and the following legal propositions must control the decision of this case:

First. Unless fraud was intended, when the conveyance

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was made by the father to his children, it is not void or voidable as to his subsequent creditors, inasmuch as he was free from debt at the time it was made. 8 Wheat. 239, and note to same case in 1 Am. Lead. Cases; 2 Kent's Com. 173; 3 Johns. Ch. 481; Id. 328.

Second. Such settlement, though voluntarily made, will be upheld. *Ellison v. Ellison*, 1 Lead. Cases in Equity, 382.

Third. There is no presumption of constructive fraud by such settlement, as there might be if debts existed and the debtor impaired the rights of creditors. *Kehr v. Smith*, 20 Wall. 31, 35.

The rule may be summed up that the gift, conveyance and settlement will be upheld "if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors." This doctrine is solid.

A fraudulent intent must be clearly shown; but if the amount of the property thus conveyed impaired the means of the grantor, so as to hinder and delay his creditors, it is void.

If an honest motive can be imputed to the donor, equally as well as a corrupt one, the former should be preferred.

If this case is tested by the rules above laid down, I think the conveyance can be sustained, for the intent to defraud creditors is not clearly and distinctly proved. There is some conflict in the testimony upon this point, but the plaintiff, upon whom the burden of proof is thrown to show the fraudulent intent, has failed to prove it.

In addition to the business of buying and selling lumber, Richards, about 1875, before his bankruptcy, with associates, built a saw-mill, which burned down a short time after it commenced work. This misfortune impaired, to some extent, his ability to meet his debts and pay losses, for, in order to obtain the means required to put into this enterprise, he mortgaged a part of his property, and after the fire borrowed money, and gave mortgage security therefor, to pay the losses. There is no evidence, however, to show that Richards, at the time he gave his daughters the land, or at the time he invested a small

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sum in improvements thereon, contemplated the erection of a mill, or engaging in such enterprise, and although I take into account the pecuniary condition of Richards during the entire period of time when these several gifts were made, the nature of this particular enterprise cannot be considered, for he did not intend at the time to embark in it.

The volume of testimony is so great that I can only briefly elaborate the facts. I have done this so far as it was necessary to apply the rules which must govern the decision.

There is nothing in the case which, to my mind, brands the conveyance as absolutely void or voidable, as no actual fraudulent intent on the part of Richards is shown when he made the gift.

The amount laid out by Richards did not impair his estate to such an extent as to be a fraud upon subsequent creditors, and under the circumstances the conveyance is not illegal and void.

A decree will be entered dismissing the bill.

The same case having been heard on appeal in the circuit court, the following opinion was delivered:

MCCREARY, *Circuit Judge*.—The facts are fully and accurately stated in the opinion of the district judge, which is given above, and it is therefore only necessary that I should state my conclusions:

First. At the time Richards purchased the farm in controversy, and at the time he conveyed it to his daughters, he was solvent, and not indebted, and the property thus settled upon his daughters was no more than a reasonable provision for them, not disproportionate to his means, taking into view his situation.

Second. The proof does not establish the allegation of the complainant that the conveyance to the daughters was made with intent to defraud subsequent creditors.

Third. The assignee insists that Richards furnished the money used in improving the farm, and in paying off incumbrances, after the title had been vested in his daughters. The weight of evidence is against this claim, as is clearly shown by

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the opinion of the district judge. Suppose, however, Richards did furnish money to his daughters, or use money for their benefit in the way suggested, would that fact render invalid the original conveyance from him to his daughters? If that conveyance was in itself *bona fide*, free from fraud, and in all respects valid, a subsequent contribution by the father, for the purposes named, would not change its character. The fact of the making of such contributions would be evidence tending to show fraud in the original transfer, but not by any means conclusive. If the original conveyance was made in good faith, while the grantor was solvent and free from debt, it was valid and must stand, even though other property may have been fraudulently given or conveyed to the same parties at a subsequent period. In such a case the remedy would not be by a bill to set aside the original conveyance, but by proper proceedings to recover the property subsequently transferred. Thus, in *Clarke v. White*, 12 Pet. 178, the supreme court say: "If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected with the other frauds, unless in some way or other it be connected with or form a part of them." Page 194.

Fourth. It appears that Mr. Richards, the grantor, after executing the deed to his daughters, took the same to the recorder's office and filed it for record. There is no direct testimony to show either that the grantees did or did not, at the time, have knowledge of and assent to the grant.

Whether they assented to the grant at the time, or subsequently, or not at all, is left to inference. If, therefore, the presumption of the law is that the grant was accepted by the grantees, that presumption must prevail. If the presumption is the other way, and the burden is upon the defendants to prove delivery to them, or something equivalent thereto, the conclusion must follow that plaintiff should recover, since no such affirmative proof is to be found in the record.

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There are numerous cases which hold that the execution of a deed or mortgage, and the delivery of the same to the recorder for record, *without the knowledge or assent of the grantees or mortgagees*, will not avail as against an attaching or execution creditor of the grantor. *Day v. Griffith*, 15 Iowa, 104; 4 Greenleaf's Cruise on Real Property, p. 12, note, and p. 13, note 1; *Samson v. Thornton*, 3 Met. 275; *Denton v. Perry*, 5 Vt. 382; *Cobb v. Chase*, 6 N. W. Rep. 264.

But the present case does not come within the principle established by these authorities.

Whether the plaintiff can be regarded as standing in the same position as an attaching or execution creditor is immaterial, since it does not appear either that the defendants were ignorant of the conveyance when made, or that they did not at any time assent to or accept it before the bringing of this suit. One or the other must be shown. If the recording of the deed is intended as a delivery, and is known to the grantee, and he assents to the same, it will take effect. 2 Washburn on Real Property, pp. 580, 581. The acceptance of the grantee will be presumed in such a case, if the deed be upon its face beneficial to him, and the circumstances are such as to warrant the conclusion that the grantor intended the delivery to the recorder to be for the use and benefit of the grantee, especially if the latter claims under it. 4 Greenleaf's Cruise, 12.

Again, the authorities are abundant in support of the proposition that the grantee in a deed executed and delivered to a third party, though ignorant of the conveyance when made, may subsequently accept it, and his title will relate back to the date of the conveyance, unless an intervening levy of attachment or execution may have defeated it. *Harrison v. Trustees, etc.* 12 Mass. 456; *Hatch v. Hatch*, 9 Mass. 307; *Foster v. Mansfield*, 3 Met. 412; *Doe v. Knight*, 5 Barn. & Cres. 632 (671); *Hedge v. Drew*, 12 Pick. 141.

We cannot in this case presume, in the absence of proof, that defendants, at no time during nearly four years that

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elapsed between the conveyance to them and the commencement of this suit, were made aware of, and assented to and accepted, the grant. Especially is this the case, in view of the allegation in the answer that the defendants have held, owned, controlled and managed the farm ever since the conveyance, and that the only occupancy has been by their tenants, and for their sole and exclusive use. This is equivalent to an allegation that the conveyance was accepted by the grantees when made, and it must be overcome by proof on the part of plaintiff.

The decree of the district court, dismissing the bill, is affirmed.

WEED SEWING MACHINE CO. v. FRANKLIN BAKER, JAMES W. BAKER and JOHN BAKER.

(*Eastern District of Missouri.* October, 1880.)

1. DECREE TO QUIET TITLE ONLY BINDS PARTIES AND PRIVIES.—A decree in chancery against F. B. and J. W. B. in a suit wherein J. B. was not a party, quieting title to certain land in the plaintiff, is not good as against F. B., who was in possession, claiming an interest prior to the commencement of such chancery suit, and still remains in possession.
2. EJECTMENT — EFFECT OF DECREE QUIETING TITLE.—This rule applies to a suit in ejectment based upon such decree to recover possession from J. B., who was not a party to it, nor in privity with any party.

Daniel Dillon, for plaintiff.

Dryden & Dryden, for defendants.

McCREARY, *Circuit Judge (orally)*.—In this cause the parties waived a jury and have had a hearing upon the merits before the court. The action is ejectment to recover certain real estate within the district.

The facts, so far as it is necessary to state them, are as follows:

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Prior to the commencement of this suit the plaintiff had recovered in this court a decree in chancery against the defendants Franklin Baker and James W. Baker (but not against defendant John Baker), quieting title to the land in question in the plaintiff. It is admitted that prior to that decree the legal title was in Franklin Baker, subject to the equities of the defendant John Baker, who was not a party to the decree, and who was in possession at the time of the commencement of the chancery suit, and is still in possession, claiming an interest as purchaser from Franklin Baker.

The plaintiff offered the decree as sufficient evidence of his title and right to possession as against all the defendants. The defendant John Baker objected, and on his behalf it is insisted that he is not bound by the decree since he was no party to it; and further, that the plaintiff cannot recover as against him upon that proof alone. The plaintiff insists that the decree is sufficient to vest the legal title in it, and that the claim of defendant John Baker upon the land is necessarily equitable in its character, and therefore such as cannot be set up as a defense to an action of ejectment in this court.

It is very clear that no one can be bound by a judgment or decree unless he be a party or in privity with a party. This for the reason that he has had no opportunity to be heard, to cross examine witnesses, or to offer evidence in furtherance of his rights. It is therefore held that, while a decree may be admissible in evidence to prove the fact of its rendition with all its legitimate consequences, it cannot affect in the least the rights of any but parties and privies.

A party in possession of land claiming an interest as purchaser, or under a contract to purchase, is not in privity with his grantor.

On the contrary his claim is adverse to his grantor, and it must follow that he is not bound by a decree against the latter in a case to which he is not a party, and rendered in a suit commenced after he purchased and took possession.

These principles, I think, apply with all their force to this

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action in ejectment. The plaintiff in the decree against Joseph W. and Franklin Baker acquired the legal title only as against them and those in privity with them. It is not a violation of the rule that the legal title must prevail in an action of ejectment, to hold that the legal title is not established in the plaintiff as against the defendant John Baker.

The case will be dismissed unless the plaintiff elects to take a nonsuit.

THE WESTERN UNION TELEGRAPH COMPANY v. THE UNION PACIFIC RAILWAY COMPANY, THE KANSAS PACIFIC RAILWAY COMPANY, and THE AMERICAN UNION TELEGRAPH COMPANY.

(*District of Kansas. October, 1880.*)

1. **PACIFIC RAILROAD ACTS—OBLIGATION TO CONSTRUCT AND OPERATE A LINE OF TELEGRAPH.**—On the face of the acts of congress of 1862 and 1864, called "The Pacific Railroad Acts," the obligation of the Union Pacific Railroad Company and its branches to build and operate for the public a telegraph line along its right of way, was an obligation which they could not abandon.
2. **ACT OF JULY 2, 1864.**—By the provisions of the fourth section of the act of July 2, 1864, "An act for increasing the facilities of telegraph communication between the Atlantic and Pacific states and the territory of Idaho," the Union Pacific Railroad Company and its branches were authorized to devolve the duty of constructing and operating the contemplated line of telegraph upon the United States Telegraph Company, and thereby to relieve themselves from that duty.
3. **CORPORATION—RECOGNITION BY CONGRESS OF AN IMPERFECT OR INCOMPLETE ORGANIZATION.**—If the United States Telegraph Company was not regularly and completely organized at the time of the passage of the last named act, the congress of the United States could adopt this imperfect or inchoate organization, and, if it was the purpose of congress to do so, confer upon it all the power specified in said act.
4. **INJUNCTION—MOTION TO DISSOLVE.**—Without finally deciding, upon this hearing, whether the power to make the contract in question can be derived from the act of July 2, 1864, it is *held*, in view of the vast interests involved, and the serious consequences to follow a dissolution of the injunction, that for the purposes of this motion there is sufficient evidence of such authority under that act.

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5. **ACCEPTANCE OF PACIFIC RAILROAD ACTS BY STATE CORPORATIONS.**—State corporations accepting the provisions of the Pacific Railroad acts are subject to all the provisions thereof. Following the Sinking Fund cases (99 U. S. 700).
6. **CONTRACT—DIRECTORS—PERSONAL BENEFIT OR ADVANTAGE RESERVED TO OFFICERS OF CORPORATION CONTRACTING.**—As a general proposition, where one of a body of individuals jointly interested in a matter consents to take a special advantage to himself, and receives a special consideration for using his efforts to procure an agreement of the whole for the benefit of a third party, if such receipt of special advantages, whether of money or property, be kept secret from his copartners or joint stockholders or those interested, and they act upon the belief that he is governed by no other interest than that which is common to them all, the contract is void. But there are circumstances in connection with the contract in question, in this case, which may or may not take it out of this principle. There was, for example, no attempt at concealment; the benefits secured did not flow to the individual but to the office, and there is no evidence that it amounted in point of fact to a pecuniary sum whose influence would be at all appreciable.
7. **QUESTIONS OF DOUBT POSTPONED UNTIL FINAL HEARING.**—A contract will not be set aside on preliminary hearing on the ground of its invalidity except in a clear case; and since the objections to the contract in question may be removed on final hearing, they will not at present be regarded as fatal to it.

C. E. Beckwith, Williams & Thompson and Geo. R. Peck,
for complainants.

J. P. Usher, A. L. Williams and Everest & Waggener, for
respondents.

Melville C. Day and Wager Swayne, for American Union
Telegraph Company.

In equity. Motion to dissolve injunction.

MILLER, Circuit Justice.—The suit in this case was brought by the Western Union Telegraph Company in one of the state courts of Kansas, and, on application to a probate judge of the proper county, an injunction was allowed which it is the purpose of the present motion to dissolve. The laws of Kansas

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make the indorsement of the county judge, on the petition that an injunction is allowed, to have the same effect as in the courts of the United States in equity proceedings is allowed to a writ of injunction regularly issued under the seal of the court.

The county judge made such an indorsement, allowing the injunction as prayed for by the bill. The prayer of the bill was in substance to restrain the Union Pacific Railway Company, the Kansas Pacific Railroad Company and the American Union Telegraph Company from interfering in any manner with the telegraph wires and other appurtenant apparatus of the Western Union Telegraph Company. The allegation on which the allowance was made, was to the effect that the defendants were about to sever the connection between the wires of the Western Union Telegraph Company and its batteries, so that they could not be worked by the telegraph company, and to connect those wires with the batteries of the American Union Telegraph Company and with batteries of the Union Pacific Railroad Company, and thus destroy the utility of those wires for the purposes of the Western Union Telegraph Company, which would be thereby excluded from the use of them for five or six hundred miles, along which they now enjoy that use. There is no denial on the part of either of the defendants that they had such purpose, and it is a part of the case shown by the record, that after the granting of this injunction by the probate judge, these parties did sever the wires as threatened, and did connect them, or attempt to connect them, with the American Union Telegraph Company. An application was made to the probate judge after the allowance of this order to dissolve the injunction. This being refused, the case was removed into the circuit court of the United States for the district of Kansas, and there an application was made to Judge FOSTER to dissolve the injunction, which was overruled by him. A similar application was made to the circuit court in session, before Judges McCABY and FOSTER; and in that case, while the presiding judge held

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that there were certain inherent defects in the contract between the Kansas Pacific Railroad Company and the Western Union Telegraph Company, under which the latter erected its wires and was operating them, which would probably authorize a dissolution of the injunction, he declined to dissolve it at the time, in order to give the plaintiff an opportunity, by amended bill, to make a case which would remove those defects. The plaintiffs accordingly filed an amended bill. A demurrer to the amended bill was overruled by Judge McCrARY at chambers, whereupon defendants answered; and on that amended bill and answer and the original papers, another application was made before Judge McCrARY at chambers, in Keokuk, for a dissolution of the injunction, and was by him set down to be heard before us at this time, in St. Louis. This application has been heard before Judge McCrARY and myself, on all the original papers in the case, — the amended bill and answer, and a very large number of documents and affidavits, now introduced for the first time. After a week of argument and a very careful consideration of the case, I propose to give the result of that consideration in the present opinion.

The line of telegraph which is the subject of the present controversy, extends from Kansas City, in Missouri, to Denver City, in Colorado; and consists of three wires, the requisite poles, batteries, and other machinery necessary to the successful working of those wires, erected along the line and on the right of way of the Kansas branch of the Pacific Railway Company. That branch has become consolidated with the Union Pacific Railroad Company, and they are both worked and held as one corporation, under the style of the Union Pacific Railway Company. The contract was made in the year 1866, between the Kansas Pacific Railway Company on the one part, and the Western Union Telegraph Company on the other, under which this telegraph line has been mainly erected and operated since it was erected. By that contract, about the construction of which the parties differ somewhat,

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there is no disagreement as to the following matters: Poles were to be erected on ground embraced within the right of way of the railroad company. That company was either to furnish the poles or to pay the price of them if furnished by the Western Union Telegraph Company, and to furnish one wire or pay the cost of that wire. The telegraph company was to furnish the batteries, and to furnish any other wire beyond that one, as it should become necessary, at their own cost. The erection of the poles, the attachment of the wires to them, and the expense of placing the batteries in position connecting them with the wires, was to be borne jointly and equally by the parties. The lines of these wires were both to be operated by operators appointed by the railroad company, and paid for jointly. The railroad company was to have the exclusive control and use of the first wire put up. The telegraph company was to have the exclusive use of the other wires until, in the opinion of the railroad company, the first wire should be insufficient for the demands of the business of the road; in which event, by a proper compensation, the railroad company was to have the use of another one of the wires put up by the telegraph company. It was one of the provisions of this contract that the railroad company should not send over its wire any commercial messages or any paid messages, or messages for any other person than for its own business; the purposes of which evidently was to leave the exclusive right to convey such messages to the telegraph company. And it was to enforce this clause of the contract that the injunction was obtained by the Western Union Telegraph Company in the state court. And it is to get rid of this provision and permit the railroad company to convey such messages, and to unite the wires of the telegraph company with the American Union Telegraph Company, that messages may be conveyed brought by the American Union Telegraph Company, over the wires of the Western Union Telegraph Company, that the present motion is made.

The first legal proposition involved in the case, as presented,

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is that the Kansas Pacific Railroad Company is forbidden by the acts of congress of the United States under which it was built, and under which it received large grants of money and public lands and other rights and privileges, to make any such contract as excludes or prevents it from carrying messages for the general public over the telegraphic lines erected on its right of way. I concur with Judge McCREARY in the opinions delivered by him on the former applications before him to dissolve this injunction: that on the face of the acts of congress of 1862 and 1864, called "The Pacific Railroad Acts," the obligation of building a telegraph line along its right of way, and of operating that line or having it operated under the control of the railroad company, was an obligation which they could not abandon, and which was inconsistent with the contract made in this case, so far as those two acts are concerned; and that if the case rested on the provision of those original Pacific Railroad acts, namely, the act of 1862 and amendatory act of 1864, the present contract would be void, as in violation of the obligations imposed upon the railroad company by those acts; and I do not propose to add anything to what he has said on that subject. If, therefore, there are no other acts of congress on the subject, nor anything else that will remove that inherent vice in the contract between the two companies, the injunction ought to be dissolved and the railroad company permitted to operate the telegraph in accordance with the obligations which those acts impose upon it for the benefit of the public. The amended bill, however, which was not before Judge McCREARY when he decided that proposition, sets up an act approved July 2, 1864, entitled "An act for increasing the facilities of telegraph communication between the Atlantic and Pacific states and the territory of Idaho," and avers that by virtue of that statute the present contract is a valid one. The first section of that act declared that "The United States Telegraph Company and their associates were authorized to erect a line of magnetic telegraph between the Missouri river and the city of San Francisco, in the state of

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California, on such route as they may select, to connect with the lines of said United States Telegraph Company now constructed and being constructed through the states of the Union." It gave the right of way over the public lands of the United States and the right to draw materials for the construction of the line from the same public lands. The fourth section is as follows: "That the several railroad companies authorized by the act of congress of July 2, 1862, are authorized to enter into an arrangement with the United States Telegraph Company, so that the line of telegraph between the Missouri river and San Francisco may be made upon and along the line of said road and branches as fast as said road and branches are built. And if said arrangement be entered into and the transfer of said telegraph line be made in accordance therewith, to the line of said railroad and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfillment on the part of said railroad companies of the provision in the act in regard to the construction of telegraph lines. And in case of disagreement, said telegraph company is authorized to remove their line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of said railroad companies."

The allegation of the amended bill is, that the Western Union Telegraph Company was at the time it made the contract for the erection of the telegraph line now in question with the Kansas branch of the Pacific Railroad Company, the successor in right and power of the United States Telegraph Company mentioned in this act. And that by virtue of the fourth section of the act, the railroad company had the right to make the contract which was made, and was by that section relieved from the obligation to construct and operate a line of telegraph for the public use. It does not admit, in my opinion, of any reasonable doubt that if the United States Telegraph Company mentioned in that statute, or any company which had the same rights and authorities on that subject that that company had, entered into an agreement with the Pacific

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Railroad Company, or any of its branches built under the authority of the original act of 1862, which secures the proper construction and operation of a line of telegraph along its road for the benefit of the public, that it is absolved from the obligation imposed upon it by the act of 1862, to construct and to operate such a telegraph line. It was manifestly the design of this act of 1864 to enable the United States Telegraph Company to become substituted by a proper arrangement with the Pacific Railroad Company and its branches, to the right to build a telegraph line along the track and right-of-way of those railroad companies, and thereby to relieve those companies from the obligation to build and operate such a line. If, therefore, the contract is one which provides for the erection of a telegraph line to answer both the purposes of the public and of the railroad company, it is one which is authorized by this statute, and which relieved the railroad company from the obligation to construct and build another line, or any line. That such is the proper construction of the fourth section of this act of 1864, is obvious from an examination of section nineteen of the original act of 1862. That section provided, "that the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California Telegraph Company; so that the present line of telegraph between the Missouri river and San Francisco may be moved upon or along the line of said railroad and branches as fast as said road and branches are built; and if said arrangement be entered into, and the transfer to said telegraph line be made in accordance therewith, to the line of said railroad and branches, such transfer shall for all purposes of this act be held and considered a fulfillment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph."

The three telegraph companies here spoken of, together constituted, at the time this statute was passed, a continuous line of telegraph from the Missouri river to San Francisco; and it

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was obvious that the building of another line parallel to that, and not far distant from it, would have a very injurious effect upon the value of the property of those telegraph companies; and it was to protect those companies and to prevent the injury which would follow from the construction of another line between the same points over an uninhabited region of country, that congress provided, that by an arrangement with the railroad company, if those companies should remove their wires along the line of that road so that they could be used both for railroad purposes and the use of the general public, then the obligation of the railroad company under the act of congress to build another line should no longer exist. The act of 1864, which we have just referred to, concerning the United States Telegraph Company, was clearly designed to give it a similar privilege, and if the arrangement was made and that company should build or transfer its line to the line of the railroad company, the railroad company in like manner was released from the obligation to construct and build another line. I hold it, therefore, to be very clear that if the present telegraph line, as it is now operated and run by the Western Union Telegraph Company, can be traced to the authority of that act of 1864, and the Western Union Telegraph Company in making that contract exercised right-fully the powers conferred upon the United States Telegraph Company, that the contract is valid, although it forbids the railroad company to convey commercial messages over the single wire which it has the right to control for its own business.

It is said that the proof offered by complainants fails to show that it is the proper successor or in any manner entitled to the right which congress conferred upon the United States Telegraph Company. The first item of evidence produced by complainants upon that subject is a certified copy of the organization of a telegraph company under the laws of the state of New York, styling itself "The United States Telegraph Company." The articles of association of that company,

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signed by three associates who had taken stock in it, acknowledged before the proper officer, were duly filed in the office of the clerk of the proper county; but it does not appear from any thing before us, that the paper itself or any copy of it was ever filed in the office of the secretary of state of New York; and it is urged that this objection is fatal to the existence of such a corporation and of its right to make any contract, or transfer any privileges or rights to any other company.

The question here presented is one in regard to which there exists some conflict of authority in the decisions of the higher courts of other states which have adopted laws similar to that in New York. The state of Illinois, under a statute very similar, has decided that the failure to record a copy of the instrument, or deposit a copy of the instrument, in the office of the secretary of state, is not fatal to the validity of the organization. The state court of Indiana seem to have decided, in a case very nearly similar, that it is. However this may be, it seems to me that the congress of the United States could adopt this imperfect or inchoate organization, needing nothing but the filing of a copy of its articles of association in the office of the secretary of state, and could, if it was the purpose of congress to do so, confer upon it all the rights and powers which it has conferred upon the United States Telegraph Company; and the only question left, therefore, for consideration, is whether this company, of which the articles of association were presented by complainants, was the United States Telegraph Company to which the act of congress refers. That company, very shortly after these proceedings, took steps to consolidate itself with three other telegraph companies, also organized or preparing to be organized under the authority of the laws of New York, and steps were taken, the proceedings of which are presented to us, which were manifestly designed in effect to amalgamate and consolidate and bring together in one organization, the rights and franchises, grants and powers of each of them. This consolidated company adopted the name of the United States Telegraph Company, and it is

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recited in its articles of association that one of its elements is the United States Company, which existed prior to the act of congress of 1864.

We see here a conscious effort, although there may be some imperfection in carrying that into effect, to unite the powers of this United States Telegraph Company, organized in 1862, prior to the act of congress, with the powers of other companies, and to keep up its name and authority by the use of the same name in the consolidated company. This last United States Telegraph Company finally became consolidated with the Western Union Telegraph Company, or their fortunes became united and amalgamated in some shape not very clearly made out, and this is the action under which the Western Union Telegraph Company claims the right to make the contract which is the subject of consideration.

I am not prepared to say, with any degree of assurance, that if this case comes to a final hearing, and no more complete evidence is then given of the corporate existence of the first United States Telegraph Company of New York, and of the transfer of the powers granted to it by the act of congress of 1864 to the Western Union Telegraph Company than has been presented on this hearing, that that contract can be sustained under the act of 1864. But I am prepared to hold that there is no such clear case made against the right of the Western Union Telegraph Company to all the franchises and privileges of the original United States Telegraph Company, as to justify me in totally dissolving the present injunction, in view of the consequences which would follow such action, which will be hereafter considered. There is enough testimony to show that there was a purpose and design, through a series of transactions, to vest in the Western Union Telegraph Company the rights which the act of July 2, 1864, conferred upon the United States Telegraph Company, whatever company that might be. The existence of this United States Telegraph Company, and the assertion of the rights of the Western Union Telegraph Company under it, and the effort to show that the contract

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now in question was made under the act of 1864 with the successor of that company, is for the first time presented to the court at this hearing, and much that might make it plain either that there was such a right or that there was not such a right, may possibly exist and be brought to light hereafter, when the case can be heard at a final hearing on the issues made by the pleadings. And this branch of the subject will therefore be postponed for the present.

We must further hold that for the purposes of this motion to dissolve an injunction which has been four times before the consideration of the proper courts already, and which have thus far failed to dissolve it, there is sufficient evidence of the authority to make that contract under the act of 1864.

It is said that the Kansas branch of the Pacific Railroad Company was the successor of a corporation organized under the laws of Kansas, and not by the act of congress, and the acts of congress of 1862 and 1864, called "The Pacific Railroad Acts," conferring upon that company the right to build a railroad and telegraph; and that because the Kansas branch of the Pacific Railroad Company does not owe its existence as a corporation to the United States, nor to any law of the United States, that therefore it is not bound by the provisions which would forbid it from making a contract such as that made with the Western Union Telegraph Company. But this proposition cannot be maintained. The corporation which accepted the grant of the United States of millions of money by way of subsidy, and millions of acres of land, and many other advantages, must be held to have accepted the entire act of congress with all the conditions which it imposed. This was held by the supreme court of the United States in the recent Sinking Fund cases (99 U. S. Sup. Ct. Rep. 700), in which the validity of the Thurman act, requiring all those railroads to provide a sinking fund for the payment of their debt, was resisted by the Central Pacific Railroad Company, organized under the laws of California, on the ground that congress could impose no such obligation upon that road. This prop-

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osition, though urged upon the court very forcibly, and much relied upon in Judge FIELD's dissenting opinion, was overruled by the court; and it is held that in accepting grants made by congress to those roads, it bound itself by all the provisions of the act of congress for the government of the companies.

Another ground of objection to the contract between the Western Union Telegraph Company and the railroad company under which this telegraph line was built, which objection goes to the validity of the whole contract, relates to a clause in it by which the telegraph company bound itself to carry over its line private and family messages of its executive officers without charge to them. The principle on which this objection rests is that this clause, securing a private advantage to certain officers of the railroad company, was in effect a bribe to secure from them the contract, to the advantage of the telegraph company and the disadvantage of the railroad company. In one of the opinions delivered by Judge McCrARY on the motions before him to dissolve or modify this injunction, he expressed the opinion that the clause in the contract, as it stood on its face, without any explanation of it, was fatal to the validity of the entire contract. I am not prepared now to either affirm or deny the soundness of that proposition.

The language of the contract on that subject is as follows:

"*Fourth.* The business of said railway, including its construction, lands, and all business of the company, and the family, private, and the social messages of the executive officers, shall be transmitted without charge between all telegraph stations on the line of said railway, and also between all such stations and the city of St. Louis, Missouri, and over all other lines in Missouri, Kansas, Colorado and New Mexico, now owned or controlled, or that may hereafter be owned or controlled, by the Western Union Telegraph Company; provided, as far as said lines in Colorado and New Mexico are concerned, the said road or roads of the Union Pacific Railway Company, eastern division, shall at the time be in process of construction towards Sante Fe, or Denver, or both; and all

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such business shall be transmitted free of charge, over all other lines owned or controlled, or that may hereafter be owned or controlled, by the said telegraph company within the United States, to an amount not exceeding the rate of four thousand dollars per annum; and for any excess above such rate the telegraph company will deduct and rebate one-half the regular tariff charges, settlements and payments for such excess, to be made yearly."

There arises on the face of this clause of the contract an ambiguity as to the precise meaning of the words "executive officers." It is claimed by complainants that "executive officers" here referred to were not the directors, but were the president, superintendent, general manager, and other officers of that class. It must be confessed that there is nothing in the context and nothing in the definition of the word "executive," until application is made to the facts which concern the nature and functions of the various officers of the company, to determine whether the directors other than the president were included under the phrase "executive officers." If there has been a practical construction of that agreement by the acts of the parties during the twelve years that the contract has been in existence, further proof may show what that construction has been, and give light to the court in deciding the question. While I am strongly in favor of the assertion of the general proposition, that where one of a body of individuals jointly interested in a matter consents to take a special advantage to himself and receives a valuable consideration for using his efforts to procure an agreement of the whole for the benefit of a third party, if such receipt of special advantages, whether of money or of property, be kept secret from his copartners or joint stockholders, or those interested with him in the same matter, and they act upon the belief that he is governed by no other interest than that which is common to them all, the contract so obtained on the part of the third person is flagitious and should be held to be void, there are circumstances in connection with this contract which may or may not be held

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to take it out of this principle. The first one of these circumstances which strikes one impressively, is that there was no attempt to conceal from the stockholders of the railroad company, nor from anybody interested in its affairs, this clause of the contract by which the executive officers were to have this special privilege in the use of the telegraph wires. There was, therefore, absent the indication which secrecy in such case gives of a corrupt and improper motive. It is also to be observed that the benefits secured did not flow to the individual, but to the office, and that as soon as any one ceased to be a member of the executive office he ceased to have the privilege conferred by this contract; and there is no evidence before the court that this privilege was enjoyed for any length of time by any one individual, or that it amounted in point of fact to a pecuniary sum whose influence would be at all appreciable.

These propositions, and the facts which may be proved on the final hearing in regard to the terms under which these privileges were to be used, and the reasons why they were, as suggested by plaintiff's counsel, designed to relieve the railroad company itself of a burden which it would have borne if the telegraph company had not made these grants of privileges, all lead me to doubt very much whether the contract will be finally held invalid on account of that clause in its original conception. For the same reason, then, that I have already stated in regard to the other allegation of invalidity of the contract, that the objection may be removed on the final hearing; that it is not at all clear to me that the objection is a valid one as the matter stands, and on account of the great and important consequences which would flow from a dissolution of the injunction, I do not think that on this motion the objection should be held to be fatal to the contract.

I wish again to recall the fact that four or five motions to dissolve this injunction have been made and overruled as many times by as many as three or four different and very competent judges. It is also proper to look to the consequences

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which would flow from a dissolution of the injunction. It is made perfectly plain, both by the answer of the defendants, and by what they have done and what they propose to do, that if this injunction is dissolved and another injunction which covers the telegraph along the line of the Union Pacific Railroad from Omaha to Ogden, that the Western Union Telegraph Company, which now and for twelve or fifteen years past has been working a continuous line, and the only line between the Atlantic coast and the Pacific coast, and especially between the Missouri river and San Francisco, will be at once deprived of the power to work any such line at all until it shall be enabled to construct a new line at least six hundred miles in length.

This corporation has come to be one whose property is of immense value,—a value almost unknown to any one. The shares of its stock are scattered all through the country, and now are and long have been the most profitable shares of any corporation now in existence. It has done the business of almost the entire country for many years past west of the Alleghany Mountains,—all the business west of the Missouri river. To suspend this business by the act of a single party, to permit the railroad company, both at Omaha and Kansas City, to cut off the connections of these wires with the Union Pacific Railroad Company east of those points, and to turn those wires into that of a rival company, is to produce an amount of financial ruin hard to be appreciated. Telegraph lines and telegraph business, like the good will of a newspaper and hotel, have a character so different from ordinary personal property, or ordinary real estate, that when we come to deal with injuries to it we must look at it in a different light from what we do the injuries to those classes of property.

The total suspension of its business for the period of time necessary to construct a line from Omaha or Kansas City to Ogden, would produce an irreparable injury within the meaning of that term, as used in equity proceedings.

It would be an injury to that company by no means com-

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mensurate with any good to result to the other company which is in contest with it. It is eminently fit, therefore, that before the judges at chambers should pronounce an order dissolving an injunction, which merely restrains the hands of the other side from this destructive proceeding, that they shall be satisfied that the rights of the party seeking this dissolution are clear, and that they are entitled to exercise the powers which will produce such disastrous results. As we have already said, we are not by any means satisfied, at least I am not, that such a right exists in the plaintiff; and I have a strong belief that it is the duty of the court to keep the hands of both of these parties so tied up, and so far at liberty only, as that the public shall not suffer, and each shall not destroy the other, until this litigation shall come to a final close by a full hearing on the merits of the case.

As I have already said, the injunction stands now upon the order of the probate judge in Kansas — an order which merely allowed the injunction as prayed in the bill. There seems to be a dispute between the counsel on either side as to the precise extent of the relief prayed in that bill, and therefore as to the extent and meaning of the injunction as it now stands. We are both of opinion that the railroad company has the right, as it has always had, to the exclusive use of the first wire on the telegraph poles; and we are of opinion that as the matter stands at this stage of the proceeding, that company should have the right, pending the further litigation of the case, to use that wire, not only for the ordinary business of the road, but for the purpose of transmitting commercial and paid messages for the public in general; that it has no right to interfere with the Western Union Telegraph Company in the use of the other two wires for the purpose of carrying all messages of whatever class it may choose to carry over those wires; and that it is proper that an order should be made instead of the order of the probate court, which is ambiguous and indefinite, which shall stand to represent this principle, and as a substitute for that order.

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VAN ALLEN v. ATCHISON, COLORADO & PACIFIC RAILROAD CO.

(District of Kansas. August, 1880.)

1. REMOVAL—"SUIT * * ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES"—ACT OF MARCH 3, 1875, § 2—CONSTITUTION, ART. 3, § 2.—A case arises "under the constitution or laws of the United States," whenever, upon the whole record, there is a controversy involving the construction of either. *Cohens v. Virginia*, 6 Wheat. 264; *Mayor v. Cooper*, 6 Wall. 247; *Tennessee v. Davis*, 100 U. S. 275.
2. SAME—TRIAL TERM.—Where a state statute did not fix the time within which the pleadings should be filed, it was the duty of the state court, upon the application of the parties, to fix a time, and, having done so, the cause was not triable until issue could be joined in pursuance of the court's order.
3. SAME—BOND—SURETIES.—A federal court will not, upon motion to remand, enter upon inquiry as to the sufficiency of the sureties on a bond, conditioned as required by the removal act, and approved by the state court.

McBride Bros., for plaintiff.

W. T. S. May and *D. Martin*, for defendant.

MCCEARY, *Circuit Judge*.—Motion to remand to state court. This is a proceeding instituted under the statute of Kansas to condemn land for railroad purposes. Laws of Kansas, 1879, p. 230.

The plaintiff's land was taken for the right of way of the defendant's railroad, and his damages were assessed by the county commissioners in accordance with the statute. The plaintiff appealed to the district court, where, in accordance with the practice in such cases, he filed a petition claiming a larger sum as damages than that allowed by the commissioners.

The defendant, answering said petition, set up as a defense that the plaintiff has no title to the *locus in quo*, and is therefore entitled to no damages.

The premises consist in part of a farm, and in part of town lots, in the town of Kernan. The answer avers that the farm

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is occupied by plaintiff under the homestead act of congress, and that such occupancy does not constitute ownership. It is further alleged in the answer that the Kernan town lots are held by the plaintiff under the provisions of the town-site act of congress, and that he has never had possession, and his claim under said act of congress is fraudulent and void. After the filing of this answer, upon motion of defendant the cause was removed to this court on the ground that the case is one arising under the said acts of congress.

Plaintiff moves to remand, because — *First*, the case does not arise under the constitution of the United States, the laws of congress, or a treaty of the United States; *second*, the application was not filed in time; *third*, no sufficient bond is filed, as required by law.

1. That the record presents for adjudication a federal question, to wit, the construction of the homestead and town-site acts of congress, is clear; but, inasmuch as the question of the construction of the acts is raised by the answer, the question presents itself whether the case is one *arising* under them. The removal act of 1875 (section 2, act of March 3) employs, in defining the causes that may be removed, substantially the same language used in the constitution to define the jurisdiction of the federal courts:

“The judicial power shall extend to all cases in law and in equity arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority.” Const. art. 3, § 2.

“Any suit of a civil nature, at law or in equity, * * * arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, * * * either party may remove,” etc. Section 2, act of March 3, 1875.

It is manifest that the words “arising under the constitution or laws of the United States” mean the same thing in the act of congress and in the constitutional provision. These words have been frequently construed by the supreme court.

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Thus, in *Cohens v. Virginia*, 6 Wheat. 264, it is said: "A case in law or equity consists of the right of one party, as well as of the other, and may truly be said to arise under the constitution, or a law of the United States, wherever its correct decision depends on the construction of either." And "the rule applies with equal force where the plaintiff claims a right, and where the defendant claims protection by virtue of one or the other." *Id.* 379. *Mayor v. Cooper*, 6 Wall. 247, 253. In *Tennessee v. Davis*, 100 U.S. 257, the supreme court say: "Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted." *Id.* 264. It seems to be settled by these decisions that a case arises under the constitution or laws of the United States whenever, upon the whole record, there is a controversy involving the construction of either.

2. Was the application for removal made in time? The statute requires that the removal shall be applied for before or at the term at which said cause could be first tried, and before the trial thereof. 18 Stat. 471.

The question here is whether, according to the practice in such cases under the law of Kansas, the case was triable at the October term, 1879. The appeal bond was filed on the first day of that term, and the case was then docketed for trial. At that time both parties applied for and obtained leave to file pleadings. If the effect of the order to file pleadings was to make the May term, 1880, the trial term, then the application was in time. It is held by the supreme court of Kansas that it is the better practice, in cases of this character, for the appellant to file a petition on taking his appeal. *R. R. Co. v. Orr*, 8 Kan. 419. It was in accordance with this rule that the state court ordered that the plaintiff have leave to file his petition on or before January 1, 1880, and that the defendant have leave to file its answer or demurrer on or before March 1, 1880, and that plaintiff reply on or before April 1, 1880. See tran-

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script. I am of the opinion that the effect of this order was to make the May term, 1880, the term at which the case could first be tried. The appeal was taken by filing an appeal bond, but it was necessary, before a trial could be had, that an issue be joined, and for that purpose something in the nature of pleadings was necessary. Inasmuch as the statute did not fix the time within which such pleadings should be filed, it was the duty of the court, upon the application of the parties, to fix a time, and, having done so, the cause was not triable until issue could be joined in pursuance of the court's order, and that was after the October term, and just in time for the May term.

3. There appears in the record a bond conditioned as required by the removal act, and approved by the state court. This court will not, upon a motion to remand, enter upon any inquiry as to the sufficiency of the sureties on said bond. That was a question for the state court.

The motion to remand is overruled.

UNITED STATES v. THE MISSISSIPPI & RUM RIVER BOOM CO.
and others.

(*District of Minnesota. —, 1880.*)

1. MISSISSIPPI RIVER — LOGS — INJURIES. — The use of the Mississippi river as a highway to run logs down to market is a right common to all, but there is no immunity to individuals for injuries committed while using such right.
2. SAME — FALLS OF ST. ANTHONY — PUBLIC IMPROVEMENTS. — An act authorizing the construction of an apron of planked timber over the crest of the falls of St. Anthony, in the Mississippi river, under the direction of the secretary of war, to protect the rock and prevent the washing away of the underlying soft sandstone, is within the constitutional jurisdiction of congress.
3. NAVIGABLE RIVER — PUBLIC IMPROVEMENTS — INJURIES — INJUNCTION. — Where a right common to all is abused, or so used as to cause damage, the injured party must seek redress by an action at law; but

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where congress has assumed jurisdiction of a river in the interest of commerce, the equitable arm of the court can furnish relief against any threatened injury to any improvements made under its authority.

Application by plaintiff for preliminary injunction.

William W. Billson, U. S. District Attorney, for United States.

William Lochren and *James Smith, Jr.*, for defendants.

NELSON, *District Judge*.—Suit is brought by the government against the defendants to restrain and prohibit them from running or permitting any logs to be run over the falls of St. Anthony, or from setting adrift, from the boom of the defendant company, any logs, which, if let loose and not guided into the channel provided by the government, would pass over said falls and seriously impair, if not destroy, the government structures erected at that point. A sluice-way through the public works built at the falls of St. Anthony, on the Mississippi river, ample for the passage of logs through it to a point on the river below, is completed according to the plan adopted by the officers of the war department in charge thereof.

This sluice-way was necessary to secure the safety of the government works erected to preserve the falls and facilitate the transportation of logs. An apron of planked timber had been constructed over the crest of the falls to protect the rock, and prevent the wasting away of the underlying soft sandstone, when it was ascertained that the passage of logs down through the rapids and over the apron, following the current of the stream, shattered, displaced and permanently destroyed sections of the wood work of which the apron is built.

On March 3, 1879, congress, in the river and harbor bill, appropriated \$10,000 to build a sluice-way through the works which secured the safe water carriage of logs to a point below the falls without injury to the works previously erected. There are no means provided by the government to direct loose logs floating down the river from above into the mouth

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of the sluice-way, and the natural current of the river would carry them through the rapids and over the apron.

The defendant boom company is a corporation created by the act of the legislature of the state of Minnesota, and has constructed its booms above the head of Nicollet island, lying in the Mississippi river one-half mile or more above the government sluice-way, and by its charter is authorized to collect and control, for the distance of twenty miles above the falls of St. Anthony, all logs coming down the river, and to assort them, and, on request of the owners, turn them out of its booms, but has no control of the logs for the distance of one-eighth of a mile above the sluice-way.

All logs, or nearly so, turned out of the boom, unless guided to the sluice-way, go over the apron, injuring it as stated. The proper officer of the government has authorized this suit, at the request of the engineers in charge, and has made the boom company, John S. Prince and Horatio Houlton parties defendant. The last named are owners of logs in the boom, who, it is alleged in the bill, have requested the boom company to turn their logs loose, and take no steps to guide them to the sluice-way, but permit them to pass over the apron, to the serious injury of the work. A motion is made, on bill of complaint and affidavit, for an injunction. The boom company presents an answer admitting in part the allegations of the bill, but denies that the passage of logs, in the present stage of water, would injure the government works, and charges that the sluice-way is not built through the works, and is not suitable or sufficient for any practical use as at present constructed. John S. Prince, one of the defendants, also admits most of these allegations by an affidavit read, and charges, *inter alia*, that the appropriations were made, used and expended to preserve the water power at the falls owned by private parties, and for their benefit; and that the averments in the bill that the works constructed by the United States are for the improvement of the navigation of the Mississippi river, or tend to protect or preserve the same, are untrue; and that the govern-

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ment works are an obstruction to the free navigation of the river. He also states that the sluice-way is inadequate, and not sufficient for the purpose designed.

Such are, in substance, the matters set up by the defendants in opposition to the relief asked for.

The Mississippi river, for a long distance above the falls of St. Anthony, is chiefly valuable as an outlet to market for logs and lumber. This branch of commerce has been developed and fostered by the state of Minnesota, and is a source of great wealth. The use of the river as a highway for such purposes is a right common to all, subject to be regulated and controlled by the federal government; or, in absence of any such regulation, by the states, where portions of the river lie wholly within their boundaries. This common right, however, to run logs down a river gives no immunity to individuals for injuries committed while using it.

The government of the United States, in the interest of this commercial enterprise, inaugurated a system of public improvements at the falls of St. Anthony, and annual appropriations are made in the river and harbor bill by congress, and expended under the direction of the secretary of war. The mode of improvement is confided to the discretion of that officer, and whatever system is adopted in furtherance of the object designated is done under the authority of congress.

The plan suggested by the engineering officers in charge was regarded suitable for the preservation of the falls of St. Anthony, for which the appropriation was made, and to facilitate the passage of logs from above the falls to the river below.

These improvements were made to protect this branch of commerce, which, in the opinion of congress, required the preservation of the falls, and whether the expenditure of money appropriated is judicious, or whether the improvements have proved a benefit to private persons, is of no importance.

The only questions involved in this litigation are: *First*, were the structures lawfully erected? The authority to make

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these improvements cannot be doubtful. The general control, protection and improvement of the navigable rivers of the United States, in the interest of commerce, are within the constitutional jurisdiction of congress. *Second*, are the improvements threatened with injury or destruction? It is substantially conceded that the acts complained of, if continued, will break up and destroy the apron erected over the falls, and the danger apprehended is of a character which, to guard against, would require the expenditure of a large sum of money. Such interference with the control assumed by the federal government over this locality cannot be permitted, and the parties threatening the safety of the public structures will be restrained, at least, until a final hearing, when all the facts will be before the court, and the rights of all parties be fully considered and adjusted.

It is true that, ordinarily, where a right common to all is abused, or so used as to cause damage, the injured party must seek redress by an action at law; but where congress has assumed jurisdiction of a river in the interest of commerce, I think it not doubtful that the equitable arm of the court can furnish relief against any threatened injury to any improvements made under its authority. It would undoubtedly be proper, and perhaps advisable, for the government to extend its improvements in aid of this branch of commerce, and adopt a more perfect system by erecting suitable structures to obviate all difficulties in the way of a free and unrestricted water carriage of logs at this point; but that a more comprehensive system has not been adopted, is no answer to the claim that improvements already made should be protected.

Unless the boom company, or the owners of logs, provide means to prevent their passage over the apron when let loose, or guide them in the sluice-way, if they are designed to be transported below the falls, an injunction will issue, and it is so ordered. See *Blackbird Marsh Co.* 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *United States v. Duluth*, 1 Dillon, 469, and authorities; *Pound v. Turck*, 95 U. S. 459; *Herman v. Beef Slough Manuf'g Co.* 1 Fed. Rep. 144.

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CHARLES H. MURRAY *et al.* v. HENRY OVERSTOLZ *et al.**(Eastern District of Missouri. October, 1880.)*

1. INJUNCTION—POWER OF CIRCUIT JUDGE.—The judges of the circuit courts have power to grant writs of injunction only in cases where they might be granted by the circuit court.
2. SAME—INJUNCTION TO RESTRAIN THE VIOLATION OF A SUPERSEDEAS. Neither a circuit judge nor the circuit court has jurisdiction to interpose by injunction to prevent the execution of the judgment of a state court upon the ground that it has been superseded by writ of error from the supreme court of the United States, or to enjoin state officials or others from disregarding such supersedeas. Only the supreme court or a justice thereof can grant an injunction for this purpose.

Motion for preliminary injunction.

C. H. Krum, for complainants.

L. Bell, for respondents.

MCCRAEY, *Circuit Judge*.—The judges of the circuit court have power to grant writs of injunction only in cases where they might be granted by the circuit court. If the case is one in which an injunction might be granted only by the supreme court, then application must be made to that court or to a judge thereof. (R. S. U. S. sec. 719.) The complainants claim to be the owners of a certain franchise known as the Missouri State Lottery. The attorney general of Missouri recently instituted a proceeding by *quo warranto* against complainants in the supreme court of Missouri, alleging that said franchise ceased and expired on the first day of January, 1878, and praying judgment of ouster. Issue was joined, and, on final hearing, judgment of ouster was rendered by the said supreme court of Missouri. The bill alleges, in substance, that the record of that case presented to the supreme court of Missouri for decision a federal question, to wit, whether, under certain statutes of Missouri, and certain contracts made thereunder and by virtue of certain decisions of the supreme court of

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that state, there was a contract extending beyond the first day of January, 1878, the obligation of which would be impaired by denying to complainants the right to carry on business as a lottery company after that date? This federal question having been decided adversely to complainants, the bill avers that they sued out a writ of error to the supreme court of the United States, and filed a bond, which, being duly approved, operates as a supersedeas. The plaintiffs' claim is that, having given a supersedeas bond, it is their right to continue their business as a lottery company pending the decision of the case in the supreme court, the same as if no judgment of ouster had been rendered; and they aver that respondents threaten that they will interfere with complainants by prosecuting, arresting and seizing any of their agents who may hereafter be engaged in the prosecution of said lottery business; thus anticipating the judgment of the supreme court of the United States upon the aforesaid writ of error. If the threatened proceedings on the part of the respondents should be enjoined at all, it is because, if permitted, they would interfere with the power and right of the supreme court of the United States, by virtue of the writ of error, to take control of, and deal with, the entire subject matter of the litigation. Whether the supreme court has jurisdiction by virtue of the writ of error, and whether, if so, the threatened proceedings would interfere with its exercise, are questions for the supreme court to decide, and which cannot be determined by a judge of the circuit court. The complainants have set out in their bill very fully the substance of the proceedings in the *quo warranto* case, and also the steps taken in order to obtain a writ of error and supersedeas, and counsel have argued before me at great length the question whether there was a federal question in the case, which involves, of course, the question whether the supreme court has jurisdiction thereof. It is not only clear that this is a question which might be decided by the supreme court, but also, that it cannot be decided by any other court. And since the decision of this question must precede, and in

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large measure determine, the question of the right of complainants to the injunction, I am clearly of opinion that the application must be addressed to the supreme court or to one of the judges thereof.

That court is authorized to issue any writ which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law (R. S. sec. 716). If the effect of the threatened proceedings would be to interfere with the exercise of the jurisdiction of the supreme court in the *quo warranto* case, or to deprive the complainants of the full benefits of their writ of error and supersedeas bond, then the supreme court can enjoin them, and a temporary injunction for that purpose can be granted by a judge of that court. I know of no authority for the doctrine that the circuit court, or a circuit judge, may interpose by injunction to prevent the execution of the judgment of a state court, upon the ground that it has been superseded by writ of error from the supreme court of the United States; or to enjoin state officials or others from disregarding such supersedeas. In any such case an injunction is in aid of the jurisdiction of the supreme court. This is, therefore, a case in which an injunction might be granted by the supreme court or a judge thereof, and not a case for the consideration of a circuit court or a circuit judge.

THE UNITED STATES *ex rel.* WELLS, FRENCH & Co. v. THE
COUNTY COURT OF KNOX COUNTY.

(*Eastern District of Missouri.* April, 1880.)

1. STATE AND MUNICIPAL OFFICERS—JUDGMENTS IN FEDERAL COURTS.
The employment by United States courts of state or municipal agencies to enforce judgments or decrees of federal courts, must be in conformity with state statutes.
2. SAME—SAME—MANDAMUS.—A writ of *mandamus* issued from a United States court to state officers cannot be for them to do what they

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have no legal right to do. The command of the writ can give them no legal authority beyond what was vested in them.

Mandamus.

TREAT, *District Judge*.—The points presented arise on a demurrer to the return to the alternative writ of *mandamus*. The only point not heretofore settled by the decisions of the United States supreme court is, whether, since the recent state statute concerning classification of funds, a *mandamus* can be awarded, so that the warrant demanded may reach the general "revenues" derived from the levy of one-half of one per cent., if the levy of one-half of one per cent. is not sufficient; or whether such general warrant for the deficiency on the one-twentieth fund shall follow the language used by the United States supreme court in the case of *The United States v. County of Clark*, 96 U. S. Rep. 211.

Since that and other decisions rendered by the same court, the state statute passed for classification of the general revenues, it is contended, would practically leave no "general funds" applicable to the payment of plaintiff's judgment. It may be that the purpose of the statute in question was to defeat the operation of the rules laid down in the decisions of the United States supreme court on this subject.

But it must be borne in mind that under previous decisions of the same court the employment by United States courts of state or municipal agencies to enforce the judgments and decrees of the United States courts must be in conformity with state statutes; or, in other words, that in the absence of authority on the part of county or municipal officers to act in the way desired, United States courts cannot compel them to do so. When United States courts seek the aid of county and municipal officers to enforce their judgments and decrees they ought not to ask said officers, who are not United States officers, to go beyond their lawful duties. In executing what United States courts demand, if they may be considered *quo ad hoc* United States officers, still they are not clothed with other

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and greater authority than is vested in them by the laws creating their offices. The command of a writ issuing from a United States court cannot be for them to do what they have no legal right to do. That command can give them no legal authority beyond what was before vested in them. The court cannot enlarge their powers. If they have the power they can be compelled to exercise it; if they have not the power the writ cannot confer it upon them.

The demurrer to the return in this case is well taken and will be sustained; but the peremptory writ will issue for a warrant upon the general funds of the county, and not, as sought, upon the general revenues. The county must continue to levy annually the one-twentieth and the one-half of one per cent., such being the extent of its powers, out of which the warrants issued must be paid. The writ may issue in accordance with the views here expressed.

THE UNITED STATES v. THE LEAVENWORTH, LAWRENCE & GALVESTON RAILROAD COMPANY.

(*District of Kansas. June, 1874.*)

1. LAND PATENTS—SUITS BY GOVERNMENT TO SET ASIDE.—Where patents for lands have been issued without authority of law, the United States may, in their own name, maintain a bill in equity, in the circuit court, to annul and set aside the patents.
2. OSAGE LANDS—CANCELLATION OF PATENTS AT SUIT OF GOVERNMENT. On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stats. at Large, 240), and the subsequent treaty with the same Indians, proclaimed January 21, 1867 (14 Stats. at Large, 687), and of the act of congress of March 3, 1863 (13 Stats. at Large, 772), granting lands to the state of Kansas to aid in the building of railroads: *Held*, that land which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy, did not pass under the said railroad grant, and that the United States were entitled to have cancelled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant.

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This is a bill in equity in the circuit court, filed by the direction of the attorney general, to set aside patents issued by the executive officers of the United States to the defendant company. The ground of the bill is that the patents were issued without authority of law and are void. The substantial question in the cause is whether the defendant company is entitled to the land patented to it. The claim of the defendant to the land is under the land grant act of March 3, 1863 (12 Stats. at Large, 772), which is in the usual form, and under the treaty of 1865, proclaimed January 21, 1867 (14 Stats. at Large, 687), which it is contended ratified or conferred the right. These acts and treaties, so far as material, are referred to in the opinion of the court.

The lands in controversy are within a tract thirty by fifty miles in extent, containing about 960,000 acres, and embraced in the counties of Neosho and Labette, and part of the counties of Bourbon, Crawford, Allen, Wilson and Montgomery, in the state of Kansas, and were part of the reservation occupied by the Osage Indians, who have been in possession of it since 1808, until after the treaty of January 21, 1867, when they removed to their new home in the Indian Territory.

By treaty of June 2, 1825 (7 Stats. at Large, 240), the Osage Indians, by article 1, relinquished to the United States their title to a large quantity of lands. The second article of that treaty then provides that, "within the limits of the country above ceded and relinquished, there shall be reserved *to and for* the Great and Little Osage Tribe or Nation, aforesaid, so long as they may choose to occupy the same, the following described tract of land." [Here describing the reservation.]

The above tract of country thus reserved to the Osages, facing on the east fifty miles and running back to the western boundary of the tract described in the first article of the above treaty, continued to be the Osage Indian reservation, and was used and occupied by them as such, and used by the government as provided in the second article of said treaty, until they relinquished their right thereto in 1867. The land in dispute

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is part and parcel of the reservation described in the second article of the treaty of 1825, and was used and occupied by the Osage Indians and the government until the treaty of 1865 was proclaimed, which took place the twenty-first of January, 1867. This last named treaty is dated the twenty-ninth of September, A. D. 1865, and was ratified on the twenty-sixth of June, 1866, with the addition of *certain amendments* thereto advised by the senate, and which amendments were accepted by the Indians on the twenty-sixth day of September, 1866, and the said treaty was proclaimed by the president on the twenty-first of January, 1867. There is an express provision in the seventeenth article of the treaty that it shall not go into operation until proclaimed by the president. 14 Stats. at Large, 687.

The nature of this treaty, and the senate amendment relied on by the defendant, sufficiently appears in the opinion of the court.

On the tenth day of April, 1869, congress passed an act authorizing *bona fide* settlers upon any lands ceded to the United States by the treaty proclaimed January 21, 1867, to purchase the same in limited quantities, within two years, at \$1.25 per acre, whether odd or even numbered sections, saving, however, the legal rights of others. 16 Stats. at Large, 55.

Under this joint resolution a large number of settlers went on the land, made the required improvements, proved up their settlements before the local office, paid their money and received their certificates of entry. Three hundred and fourteen thousand, two hundred and twenty-eight acres of this land was entered under this joint resolution, and the settlers thereon, in addition to the fees and expenses of entering the same, paid the government therefor the sum of \$454,072.10. Nearly all the rest of these lands have been settled upon; some under the joint resolution, by persons who were not able to make payment within the two years it was in force, and others under the belief that the trust specified in the Osage treaty, that these lands were to be sold on the most advantageous terms

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cash, would be carried out by the government, and that consequently they would be able to purchase their lands for cash when the government executed the trust.

There are between thirty thousand and forty thousand of these settlers upon the land in controversy, who are indirectly interested in the result of the present suits.

The entries of the land under the joint resolution have been ordered to be set aside and cancelled by the secretary of the interior, on the sole grounds that these railroads had a prior grant of these lands. They have nearly all been cancelled, and are being cancelled as they are reached in the regular course of business in the land department. The interior department at different times has been divided in opinion whether the railroad grants include the land in question.

Geo. R. Peck, United States District Attorney, and *Wilson Shannon* and *McComas & McKeighan*, for the United States.

S. O. Thatcher, *T. C. Sears* and *N. T. Stephens*, for the defendant.

MILLER, *Circuit Justice*.—This case, with that of the same plaintiffs against the Missouri, Kansas & Texas Railroad Company, is submitted to the court on the bills, answers, replications, documentary evidence, and agreed statements of facts. The facts are undisputed, and without complication. The questions to be considered are exclusively questions of law.

The bill is filed by the United States, under the direction of the attorney general, to set aside and annul certain patents for lands, issued to the defendant by the secretary of the interior; on the ground that they were issued without authority of law. The case of the *United States v. Stone*, 2 Wall. 525, is conclusive, so far as any authority is necessary, of the right to the relief sought, if this statement be true.

The defendant, a corporation which has built a road through the lands in controversy, and received of the United States the

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patents which are assailed in the bill, asserts the validity of these patents under an act of congress of March 3, 1863, and the treaty with the Osage tribe of Indians, proclaimed January 21, 1867.

In addition to the very able oral arguments on both sides at the bar, and the printed arguments of counsel engaged in the present case, there have been filed copies of printed arguments before the secretary of the interior, which show that his action in issuing the patents was not hasty, or wanting in reflection, but was the result of deliberate judgment after hearing counsel. This circumstance is not without embarrassment in the minds of the court now called on to consider the same question. But the constitutional adviser of the government, the attorney general of the United States, has felt it to be his duty to ask for a cancellation of these patents, and, as the only question raised is upon the proper construction of the act of congress and the treaty aforementioned, it is eminently a judicial one, which the court cannot avoid, or decline to decide; how high soever may be its respect for the decision of the department of the interior.

The act of congress referred to, found in 12 Statutes at Large, p. 772, by its first section, grants to the state of Kansas, for the purpose of aiding in the construction of certain railroads and branches, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and each of its branches.

The road, so far as the matter now in issue is concerned, is described in the act as one from the city of Leavenworth, by way of the town of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state, in the direction of Galveston Bay, in Texas. This description would carry the road through a large body of land, then in the peaceful possession and occupancy of the tribe of Osage Indians, lying within the border of the state of Kansas. By a treaty between the United States and this tribe, made September 29, 1865, before the line of said railroad was located, the tribe

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ceded to the United States a large body of lands, embracing those in controversy.

The first question, therefore, which presents itself for solution, is whether the grant of lands, as made by congress in 1863, includes the lands then held by the Osage Indians, by the ordinary tenure by which Indian tribes hold lands in the United States, but afterwards ceded by treaty to the government. I say, by the ordinary tenure by which Indians hold lands, because I do not find anything in the language of the treaty of 1825 with that tribe which changes the nature of their title.

Counsel for defendants have supposed that in considering the effect of the grant under the act of 1863 upon these lands, a material consideration, favorable to their claims, is that the grant is to be construed with reference to the condition of the title of these lands when the line of the road was located and adopted by the company. This argument is based upon what must be conceded to be true, that the particular congressional subdivisions of alternate sections of odd numbers which are to constitute the specific lands granted by the act, must be determined and can only be determined by the location of the line of the road, by an actual survey, showing its relation to those sections. The counsel have, therefore, argued with much force that the act of congress is not a grant *in presenti*, but a grant *in futuro*, and that as the particular sections granted must await the location of the road to determine where they would fall, therefore that *time*, and that *location*, must govern or be looked to as governing all other considerations bearing upon the extent or limits of the grant.

This proposition, however, is obviously unsound, in view of the general course of the road established by the grant. It must be a road from Leavenworth to the southern boundary of the state, in the direction of Galveston Bay, in which Lawrence and the Ohio City crossing are points and the lands upon which it must operate; or, in other words, the *general* location and character of the lands which may be taken under the

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grant, are either definitely laid down in the act, or are to be inferred from considerations existing at the time the act was passed. And this is true, whether in technical language we call it a grant *in presenti* or a grant *in futuro*. In point of fact it has some of the characteristics of both classes of grants.

As these lands, though then in possession of the tribe, are in the line of the proposed road, and between Leavenworth and the southern boundary of the state, they are lands within the general descriptive terms of the grant, unless they are excepted out of them by other parts of the act, or by other paramount considerations.

I am of opinion that on both these grounds the act cannot be held to include these lands.

1. When the act was passed the lands were, and had been for a very long time, in the peaceful and undisputed possession of the Osages. And though the treaty of 1825 between them and the United States did not so far vary their tenure as to give them a fee simple title, or, indeed, anything but a usufructuary right, it did guaranty to them the exclusive possession and use of these lands "so long as they may choose to occupy the same." This treaty was in full force when the act under which defendant claims was passed, and it is not believed that at that time any proposition to relinquish this possession had been made by the tribe, or any effort by the United States to induce them to do so. To hold, then, as argued by the defendants, that whenever they might choose to locate the line of their road through the Indian Territory, the title to the land, with all that full title implies, passed to them by virtue of this act, so far as odd sections for ten sections in width on each side would go, is to hold that congress had violated this treaty provision, had disregarded the generally conceded rights of Indians in such lands, and had authorized a gross injustice to a feeble and ignorant ward of the government. For if the lands were subject to the grant at all, it must be admitted that no provision whatever is made in the act for the protection of

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Indian rights, nor even for delay in enforcing the title thus passed to defendants.

When I consider that in the many grants of this character made by congress they have never, unless in this case, intended to include lands which, by treaty, or any other contract, or indeed any other equitable consideration, they should not grant, I can hardly believe that they intended, by the use of general terms necessary to a description of the route of the road, to grant away the lands which by all these considerations they were bound to retain within their own control.

In saying this, I do not consider the question of the power of congress over lands thus situated. I consider only the question of intent, of the actual will of the legislative body, which they designed to put into the form of a statute. It is this, as in all cases of construction, which must govern; and if it were a question now for the first time presented to my consideration, on these general words of description alone, in the grant, I do not see how I could hold that congress intended to include these Indian lands.

But the case does not rest on these general words of description alone. This was by no means the first act of congress donating lands to aid in construction of railroads. Millions of acres had been previously granted for the same purpose, and so many statutes of that kind had been passed, that the language in which the grants were made had become reduced to settled formulæ, and one of these formulæ designed to protect rights previously acquired, as found in every other statute of a similar character, is found in this. It is in the shape of a *proviso* to the granting section, in the following words:

"That any and all lands heretofore *reserved to the United States* by any act of congress or *in any other manner, by competent authority*, for the purpose of aiding in any object of internal improvement, or *for any other purpose whatsoever*, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through

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such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States."

It will be thus seen that from the operation of this act, as of all others of like character, and by the settled policy of the government, there is excepted any and all lands which, by act of congress, or in any other manner, by competent authority, for any purpose whatsoever, is reserved to the United States.

I cannot adopt the criticism of distinguished counsel, that the exception here provided for is limited to lands set apart and reserved for some special use which the government of the United States may have for them. These acts are all dealings with lands which *belong* to the United States — lands over which its ownership and dominion are absolute. There is no occasion, therefore, to make of such lands a reservation for the benefit of the United States. But there were many cases in which, while retaining the title, the government, by some of its branches, had set apart, had reserved for special uses of others, and for other uses than those of the government, lands of the United States. Such is the construction placed upon this clause in the cases of *Wolcott v. The Des Moines Navigation Company*, 5 Wall. 681, and fully reconsidered and adopted in the more recent case of *Williams v. Baker*, 17 Wall. 144. Can it be said, with any show of reason, that the lands under consideration in those cases, which were withdrawn from sale by reason of the disputed claims of the state of Iowa, were reserved to the use of the United States?

If, however, this criticism has any just foundation in its application to the general clause of exception found in this and in all other land grants, it cannot affect the present grant; for in proceedings for the probable failure of the grantee, from various causes, to obtain all the odd sections on each side of the road within the prescribed limits, by giving other land in place of them, among the causes of such failure are mentioned previous sales, or grants, homestead rights, "*or that the same has been reserved by the United States for any purpose what-*

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soever." Now if the solemn covenant in a treaty made by the United States with a tribe of Indians, that these lands "shall be reserved to and for the Great and Little Osage tribes or nations aforesaid, so long as they may choose to occupy the same," is not a reservation by the United States for another purpose than building railroads, it is difficult to comprehend the use of language or what kind of reservation that clause was meant to cover.

I am, therefore, of opinion that, by the necessary outlook at the condition of this land when the grant was made, and the gross violation of justice and solemn treaty rights in the Osages which a grant so construed necessarily implies, congress did not intend to include these lands in the grant. And, 2. That in each of the two clauses reserving lands from the operation of the act, they have by apt words expressed the intention that these lands should not be included in the grant.

The treaty with the Osage Indians, of which we have been speaking, contains a clause which is relied on by defendants as sufficient to remove any doubt which may arise from the foregoing views, and I now come to consider that branch of the subject. By the first section of that treaty as originally negotiated and signed on the twenty-ninth day of September, 1865, the Osages sold to the United States that part of their lands which includes the land now in controversy, with others. And in consideration of this grant and sale to the United States, the government agreed to pay the sum of \$300,000, to be placed to the credit of the tribe, in the treasury of the United States, and that interest thereon at the rate of five per cent. per annum should be paid to the tribes. The lands were to be surveyed and sold for cash as public lands are surveyed and sold under existing laws. After reimbursing the United States, the cost of survey and sale and the sum of \$300,000 above mentioned, the remaining proceeds of sale were to be placed in the treasury to the credit of the civilization fund, to be used under the direction of the secretary of the interior,

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for the education and civilization of Indian tribes residing within the limits of the United States.

When the treaty was under consideration in the senate, that body made numerous verbal amendments, and among others not merely verbal, they inserted after the word "laws" the words, "including any act granting lands to the state of Kansas in aid of the construction of railroads through said lands." To this amendment, made June 26, 1866, the Indians consented. So that this part of the treaty, as finally proclaimed January 21, 1867, reads as follows:

"Said lands shall be surveyed and sold under the direction of the secretary of the interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, *including any act granting lands to the state of Kansas in aid of the construction of a railroad through said lands*, but no pre-emption claim or homestead settlement shall be recognized." 14 Statutes at Large, 687.

The phrase thus inserted and here italicised, is supposed by the defendant's counsel to have reference to the lands now in controversy, and to have the effect of subjecting them to the railroad grant. The difficulty of determining what is their precise meaning in the connection in which they are employed, is very great. As regards their influence on the decision of the question before us, they may be, or rather must be, considered in one of these lights. 1. As granting by treaty, and by force of their own meaning, lands to aid in the construction of this railroad which had not been so granted before. 2. As placing, by means of a treaty with these Indians, a construction upon the doubtful language of the act of congress which we have already considered. 3. As a recognition, by competent authority, of the existence of such a grant, which must necessarily be the act aforesaid.

1. The first of these propositions is wholly inadmissible. Conceding the doubtful proposition that it was within the power of the president and senate and this tribe of Indians, without the assent of the house of representatives, to have

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appropriated these lands to such a purpose, they have expressed no such intention. Whatever the language may or may not mean, it is clear that it was not intended to go beyond existing laws. It did not design to make any new law or confer any new right.

2. Nor is it easy to believe that the senate of the United States would undertake, in a treaty with Indian tribes, to construe an act of congress. If they did, they certainly could intend to go no further than to express their own understanding of the meaning of the statute, without designing to give to that expression the authority of a legislative construction. Neither the senate alone, nor in conjunction with the president, is authorized to construe acts of congress so as to bind the legislative and judicial departments of the government.

In saying this it is not intended to deny that any contract in such a treaty, by which rights are conferred on either party to the treaty, based upon a construction of an existing act of congress, may be valid, and the contract be construed as it was understood by the parties. But in this case neither the state of Kansas nor the defendant corporation were parties in the treaty, nor was it the purpose of the treaty as amended, to confer any new right on these or either of them.

Nor do the words inserted, or the language of the treaty as amended, imply any intention to construe the act of congress granting lands to this road. The act is not recited or referred to, except inferentially. No doubt or question of its construction is raised or decided. If referred to at all, it is hypothetically, as "any law granting lands to aid in constructing a railroad through said lands." Of course, if there was no such law, this treaty did not undertake to make one.

3. But the force of this phrase in the treaty must rest on the third proposition I have suggested, namely, that it is a recognition of the act we have been considering as a grant of these lands.

I have no hesitation in expressing my belief that the senator, whoever he may have been, that suggested that amend-

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ment, had in his mind the act which we have already construed, and that his purpose was to incorporate into the treaty a recognition of the *validity of the grant*, so that the treaty should not defeat it. There may have been in his mind, there probably was, a doubt of the right of congress to make such a grant in the face of the treaty of 1825. The treaty now under consideration, originally presented to the senate, provided for the sale of *all these* lands, and for the disposition of *all* the money arising from such sales, in a manner inconsistent with such a grant. With these two treaties staring him in the face, he must have felt the doubt whether the grant, even if by its terms it had included these lands, would be upheld as valid. To remove the argument which might be drawn from this treaty as originally made, it was easy to induce the senate and the Indians to recognize any right which may have been acquired by that act, or any other which was an existing law when the treaty was ratified by the senate. In consenting simply to this, the senate would feel that no wrong was done, because no new right was conferred by or concealed in the amendment. At the same time, as the new words introduced designated no specified statute or law, the attention of the senate was not, probably, directed to this particular statute. But as no other law was then in existence, so far as is shown to us, which, by remotest inference, granted lands to aid in constructing a road through these lands, I must believe that the framer of the amendment had this one in his mind.

The true intent and meaning of the clause in the mind of the senate seems to have been this: that, as the treaty directed *all* these lands to be sold, and made provision for the disposition of *all* the proceeds, and, as it was suggested that there might be a railroad grant or grants which covered some of the lands thus directed to be sold, this provision was inserted to remove or prevent a conflict between the treaty and the statute, if any such existed.

But this provision, intended to prevent the treaty from defeating the statute, if such existed, is now relied on to give the

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statute a construction which we have already said was forbidden by its own terms. Leaving out of the case the want of authority in the treaty-making power to construe statutes for the courts, and the improbability that the senate would attempt in this mode to give a construction to the act of congress, it is clear that they did not *intend* to do this. They meant to say that *this treaty* shall not, by reason of its comprehensive terms in disposing of these lands, destroy existing rights. It recognizes existing laws, and, in the sale of these lands and disposal of the proceeds, existing laws shall be respected, if any exist, appropriating any part of these lands. But it certainly did not intend to declare what rights existed, or to construe statutes on which rights might depend, or to create rights in that regard which did not exist independent of the treaty.

As I have already expressed my clear conviction that the act of congress did not grant any of these lands, but by express language excepted them out of the grant, I cannot give to this ambiguous phrase in the treaty, after conceding to it the meaning most favorable to defendants of which it is susceptible, the effect of creating a grant of these lands where none existed before.

These propositions, in my judgment, dispose of the case. They require that the patents issued by the United States for these lands be set aside, annulled and held for naught, and that the defendants be decreed to have no title in any of the lands in question, and perpetually enjoined from asserting such title.

DILLON, *Circuit Judge*.—I fully concur in the conclusion reached in the foregoing opinion, and in the reasons advanced to support it.

DECREE ACCORDINGLY.

United States of America v. Missouri, Kansas & Texas R'y Co.

THE UNITED STATES OF AMERICA v. THE MISSOURI, KANSAS
& TEXAS RAILWAY COMPANY.

(District of Kansas. June, 1874.)

LAND GRANT TO AID RAILWAYS — INDIAN RESERVATION — TREATY WITH OSAGE INDIANS CONSTRUED.—For reasons similar to those in the case of *The United States v. The Leavenworth, Lawrence & Galveston Railroad Company, supra*, the lands reserved for the benefit of the Osage Indians did not pass, under the land grant of congress, to the state, to and in the building of railways, approved July 26, 1866.

The facts in the case appear in the case of the same plaintiff against the Leavenworth, Lawrence & Galveston Railroad Company, *supra*.

George R. Peck, District Attorney, *Wilson Shannon* and *McComas & McKeighan*, for the United States.

T. C. Sears, for the defendant.

MILLER, *Circuit Justice*.—This case differs from that of the same plaintiff against the Leavenworth, Lawrence & Galveston Railroad Company, in this: that the act of congress which is the foundation of defendant's claim to the lands in controversy, was passed July 26, 1866.

The significance of this difference in the dates of the grants is found in the assertion of defendants that the lands in question had then been ceded, by the treaty which we have discussed in that case, to the United States.

It is hence argued that, as the United States had then the title to these lands, unincumbered by the Indian right of occupancy, there is no reason to suppose they were not included in the general granting clause, or that they were reserved within the meaning of the excepting clause.

It will be perceived, by looking at the date of the act of congress, and the dates of the respective stages of the treaty, that the treaty had passed the senate, but with material

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amendments, June 26, 1866, one month before the approval of this bill by the president. But it had then to be submitted to the Indians for their action on these amendments. Their approval was given September 21, 1866, two months after the passage of the act of congress, and the treaty only became valid and operative by the proclamation of the president of January 21, 1867.

There was, therefore, no valid subsisting treaty by which the Indian title to these lands was extinguished when the act of July 26, 1866, became a law.

But if the treaty had been fully ratified at the date of the passage of the act under which defendants claim, that treaty was, itself, as much a reservation of these lands, within the meaning of the excepting proviso, as the treaty of 1825 was in the case we have before considered. It directed a sale of *all* these lands. It disposed of *all* the proceeds of the sale, and, by a necessary implication in appropriating them to other purposes, they were reserved for those purposes.

The amendment to the treaty which we have considered, as it regards the other case, can have no application to the act of July 26, 1866, because by its express terms it is limited to existing laws. The amendment had been acted on, and passed from the control of the senate, a month before this bill became a law. It was not an existing law when the amendment was proposed and adopted, and the amendment, therefore, had no reference to it.

The argument that the bill and the treaty must both be considered as pending at the same time, and therefore construed with reference to each other, is not, in my judgment, entitled to much weight. If it had been the intention of the *senate*, in making the treaty, to have consented or contracted that the bill which was then pending, and which might, or might not, become a law, granting lands to the state of Kansas, should include these lands, they would certainly have used language that looked to that purpose. Their language has reference only to grants already made to existing laws.

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So, if *congress* had intended to grant these lands, knowing that a treaty for their cession was then under consideration in the senate, which, by its provisions, appropriated the lands and proceeds of their sale to other purposes, they surely would have used some language to specifically include these lands, or at least to take them out of the excepting clause.

A decree similar to that in the other case must be entered.

DILLON, *Circuit Judge*.— I concur.

DECREE ACCORDINGLY.

CHAFFE & BRO. v. OLIVER.

(*Eastern District of Arkansas*. —, 1890.)

HUSBAND AND WIFE — MARRIED WOMAN'S SEPARATE PROPERTY — CONVEYANCE BY HUSBAND.— A wife owned and resided with her husband upon lands which were her separate property and estate under the statute. Her husband conveyed these lands to a trustee to secure the payment of a debt. The trustee sold the lands in pursuance of the power contained in the deed of trust, and made a deed to the purchaser, after which the husband acknowledged himself to be a tenant of the purchaser, to whom he agreed to pay rent for the lands. In an action brought by the purchaser against the husband for the possession of the land, *held*, that the wife should be admitted a defendant, and that upon these facts the plaintiffs could not recover.

Mrs. Oliver owned, and, with her husband, lived upon certain lands, which were her separate property and estate under the statute. Oliver, her husband, conveyed these lands to a trustee to secure a debt due from him to the plaintiffs. His wife signed this conveyance, but her acknowledgment was defective. The trustee in the deed sold the lands under the deed of trust to the plaintiffs, and executed to them a deed therefor. After the sale of the lands Oliver leased them from the plaintiffs. According to the terms of that lease the plaintiffs are entitled to the possession of the lands, as against Oliver,

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and this action of unlawful detainer was brought against Oliver for the purpose of dispossessing him.

Mrs. Oliver filed her petition to be made a defendant, in which she sets up that the lands were her sole and separate property and estate; that she never executed and acknowledged the deed of trust which is the basis of the plaintiffs' claim to the lands, and that she never authorized or assented to the lease of the lands by the plaintiffs to her husband; that she is now, and for many years prior to the execution of the deed of trust and lease had been, in the actual occupancy and possession of the lands as her separate property and estate.

Yonley & Whipple, for plaintiffs.

U. M. Rose, for defendant.

CALDWELL, *District Judge*.—The learned counsel for the plaintiffs concede Mrs. Oliver's acknowledgment of the deed of trust is fatally defective. On the showing made Mrs. Oliver ought to be admitted to defend the suit. *Lewis v. Brewster*, 57 Pa. St. 410; *Johnson v. Fullerton*, 44 Pa. St. 466; *Gantt's Digest*, §§ 4481-2. In the deed conveying the lands to Mrs. Oliver, the grantor declares the conveyance is "a gift of said lands which I make to my daughter as a portion of my estate, hereby intending to vest in her a separate property under the laws of Arkansas."

The grantor obviously intended to limit the estate to the separate use of Mrs. Oliver. This intention is expressed in terms, and the use of the word "separate," according to the modern English authorities, is sufficient of itself to exclude the marital rights of the husband. *Bispham's Eq.* § 100; 2 *Perry on Trusts*, §§ 647, 648; 1 *Bishop on Married Women*, §§ 817, 824.

The deed to Mrs. Oliver does not in terms pursue the language of section 8, ch. 111 of *Gould's Digest*, but that is not necessary; that act was intended to extend and enlarge the rights of married women to their separate property, and

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restrict the common-law rights of the husband in the wife's property.

It certainly was not intended by that act to restrict the operation of the existing and well settled rules of equity by which a wife was secured in the separate use of her property, and to declare that a conveyance that, by its terms, was in equity sufficient to limit the estate to the separate use of the wife, should no longer have that effect.

Any language in the deed which, prior to the passage of this act, would have been effectual to limit the estate to the separate use of the wife, was still effectual for that purpose after the passage of the act. 2 Bishop on Married Women, §§ 90-92.

In the absence of this statute, Oliver would, in equity, have held these lands as trustee for his wife. Under the statute both the legal and equitable titles were united in her, and, in the language of the act, she was possessed of them "in her own right and name, and as of her own property." In a word, she was invested with the legal title, freed from the marital rights of her husband and the claims of his creditors. *Howell v. Howell, Adm'r*, 19 Ark. 345; 1 Bishop on Married Women, §§ 799-801; *Allen v. Hightower*, 21 Ark. 316.

In the absence of the statute, Mrs. Oliver would have been driven to her remedy in equity to recover this property (1 Bishop on Married Women, § 801), and in this court she could not have availed herself of her equitable title as a defense to this suit; but, under the statute, she is the legal owner of the lands, and by the provisions of the code may sue and defend in her own name, at law, for the protection of her right. *Gantt's Digest*, § 4487; *Trieber and wife v. Stover & Co.*, 30 Ark. 727.

The deed to Mrs. Oliver, by its terms, disclosed that these lands were her separate estate; and this deed was recorded before the execution, by her husband, of the deed of trust to the plaintiffs, and before the execution by him of the lease to the plaintiffs. The record of the deed was notice to the plaintiffs,

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and equivalent to filing a schedule. Gould's Digest, § 8, ch. 111. The deed of trust and lease were nullities as against Mrs. Oliver. Oliver had no possession of the lands or right of possession, but entered under and in subordination to his wife's title. If it be conceded that the lease estops him to deny plaintiffs' title, it does not bind or estop his wife, who all the time has been in the possession of the lands, and entitled to the rents and profits, to the exclusion of her husband and his grantors. She is now here setting up her rights, and she cannot be deprived of them by any lease or other devise of her husband. She is entitled to a judgment that will leave her in the enjoyment of that which is clearly hers.

Such a judgment necessarily enures to the benefit of her co-defendant, her husband, because if one defendant shows a good right to the exclusive possession of the whole premises, the plaintiffs have no right of possession, and their action fails as to all of the defendants.

It would be a vain thing to render judgment in favor of the plaintiffs, and against one defendant, upon a record and evidence that disclosed that neither that defendant nor the plaintiffs had any title or right of possession. Besides, the husband has a right to live with his wife on her lands, and a judgment of ouster against him on a lease of her lands, not assented to by her, and which he had no right to make, and that did not bind her, would result in dispossessing the wife from her lands, or in separating husband and wife. Neither of these things can be done. The right of possession in the wife enures to the benefit of the husband, in such case, and as the plaintiffs have no right of possession against the wife, they have none against the husband, by reason of the paramount right and duty of husband and wife to live together, and which is a right and duty founded on such high considerations of public policy that no instrument executed by either can be used by a third party, by way of estoppel or otherwise, to destroy the right or release from the duty.

Butler v. Douglass.

BUTLER and others, Trustees, v. DOUGLASS and others.

(*Eastern District of Arkansas. —, 1880.*)

1. **EQUITY—STATE AND FEDERAL COURTS.**—In the determination of a question of equity law, the federal and state courts appeal to the same sources of information on equity jurisprudence, and the decisions of either are not binding on the other.
2. **SAME—VENDOR'S LIEN—FORECLOSURE—STATUTORY BAR.**—In Arkansas there is no statutory bar to a suit in equity to foreclose a vendor's lien for the purchase money of real estate, where the vendor has not parted with the legal title.
3. **SAME—SAME—SAME—REASONABLE TIME.**—In such case the lien must be enforced within a reasonable time, and the federal courts hold that that reasonable time is not less than twenty years.
4. **SAME—LEGAL TITLE—BONA FIDE PURCHASE—NOTICE.**—The protection extended by a court of equity to a *bona fide* purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title is not protected, even though without actual notice.

B. C. Brown, for plaintiffs.

Pindall, Dodge & Johnson, for defendants.

McCRARY, *Circuit Judge*.—This cause has been submitted upon the pleadings and proofs. The facts are as follows: The complainants, being the owners of the real estate described in the bill, contracted to sell the same to B. W. Lee and Alfred Douglass. Lee gave notes for the purchase money, and complainants, retaining title in themselves, gave a bond conditioned for a conveyance upon payment of the notes.

The purchase money notes are still held unpaid by complainants, who bring this suit to enforce their vendor's lien. The purchasers, B. W. Lee and Alfred Douglass, sold the land to the defendant Thomas Douglass, making to him a deed, under which he entered into possession and had held the same for a period of about eighteen years prior to the commencement of this suit. There is a plea of the statute of limitations.

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1. The supreme court of this state have decided that there is no statutory bar to a suit in equity to foreclose a vendor's lien for the purchase money of real estate where the vendor has not parted with the legal title. *Hall v. Denckla*, 28 Ark. 510. Whether, therefore, a federal court of equity in this state should, by analogy, adopt as the period of limitation the length of time required to bar an action at law for the purchase money, or an action of ejectment for the land, or whether the payment of the purchase money and satisfaction of the lien will only be presumed after the lapse of twenty years, is a question of equity law to be determined by a resort to the recognized authorities and sources of information on equity jurisprudence.

In the determination of such a question of equity law the federal and state courts appeal to the same sources of information, and the decisions of either are not binding on the other. *Johnson v. Roe*, 10 Cent. Law Jour. 328 [S. C. 1 Fed. Rep. 692], and cases cited.

2. The defendant Thomas Douglass was not an innocent purchaser without notice, because his grantors had only an equity in the land. He was bound to take notice of the fact that the legal title was in complainants, and held as security for the unpaid purchase money. The protection extended by a court of equity to a *bona fide* purchaser belongs only to the purchaser of the legal title without notice of an outstanding equity. He who purchases no legal title is not protected, even though without actual notice. Story's Eq. Jur. § 1502; *Vattier v. Hinde et al.* 7 Pet. 252.

3. When a purchaser goes into possession under a contract of purchase, equity makes the vendor a trustee to the vendee for the conveyance of the title; the vendee is a trustee for the payment of the purchase money and the performance of the terms of the purchase. 10 Pet. 225; *Lewis v. Hawkins*, 23 Wall. 119. Such a trust, however, must be enforced within a reasonable time. What that reasonable time is may be somewhat unsettled, and may vary according to circumstances; but

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it is settled, so far as the federal courts are concerned, that it is not less than twenty years. *Boone v. Childs*, 10 Pet. 177, 223-224; *Lewis v. Hawkins*, *supra*. The statute of limitations did not run against complainants during the war of the rebellion. *Brown v. Hiatts*, 15 Wall. 178. As the time of the defendant's occupancy has been less than twenty years, exclusive of the period of war, the defense of the statute of limitations is not good, and there must be a decree for complainants.

ON REHEARING.

McCRARY, *Circuit Judge*.—Upon motion of counsel for respondents, in the foregoing case, a reargument was ordered, and the case has been reconsidered. It is insisted that it has become a rule of property in Arkansas that suits in chancery, to enforce a lien upon real estate created by sale under title bond, must be commenced within the same period limited by law for bringing ejectment, in analogy to the statute of limitations. This suggestion is answered by the case of *Lewis v. Hawkins*, 23 Wall. 119, which went up from Arkansas. In that case the supreme court say: "In many of the cases it is held that the lien of the vendor, under the circumstances of this case, is substantially a mortgage. It is well settled that the possession of the mortgagor is not adverse to the mortgagee. In the case last cited it is said that to apply the statute of limitations 'would be like making the lapse of time the origin of title in the tenant against his landlord.' That the remedy upon the bond, note, or simple contract for the purchase money is barred in cases like this, in nowise affects the right to proceed in equity against the land. As in respect to mortgages, the lien will be presumed to have been satisfied after the lapse of twenty years from the maturity of the debt, but in both cases laches may be explained and the presumption repelled. The principles upon which this opinion proceeds are distinctly recognized in *Harris v. King*, 16 Ark. 122. That case alone would be decisive of the case before us. The considerations which apply where the vendor in such

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cases resorts to an action of ejectment were examined by this court in *Burnett v. Caldwell*, 9 Wall. 290." The case of *Burnett v. Caldwell* here referred to seems to establish conclusively the doctrine that the vendee, under a bond for a deed, though placed in possession by the vendor, does not hold adversely to the latter. The court say: "If the contract stipulates for possession by the vendee, or the vendor puts him into possession, he holds as a licensee. The relation of landlord and tenant does not exist between the parties. The characteristic feature of that relation is wanting. The vendee pays nothing for the enjoyment of the property. The case comes within the category of a license. In such cases the vendee cannot dispute the title of the vendor, any more than the lessee can question the title of his lessor."

In *Harris v. King* (16 Ark. 122), the supreme court of Arkansas recognized the doctrine announced in these decisions. I do not feel at liberty to depart from that doctrine, and I do not think it can be maintained that a different rule has been, by other and later decisions, so firmly established in Arkansas as to constitute a settled rule, respecting property in that state, which the federal courts are bound to follow. The doctrine that the purchaser who enters into possession without obtaining a conveyance of the legal title, and without paying the purchase money, who holds only under a bond for a deed, to be executed when the purchase price is paid, is a mere licensee, and a trustee for his vendor, having no adverse relation to him, is so well grounded in reason, and so thoroughly fortified by authority, that I am not disposed to depart from it. By the very fact of taking and holding under a bond for a deed to be thereafter executed by the vendor, such a purchaser recognizes the title of his vendor, and acknowledges himself as holding in subordination, and not in antagonism to it. True, this relation may subsequently be changed, and the purchaser may assume an adverse position; but, when this is claimed, it must be shown by proof. If it appears that he entered into possession under a bond for a deed, and in amity

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with the holder of the fee, the law will presume a continuance of that relation until the contrary appears. And it is equally clear that one who purchases from the holder of a mere equity of this character takes no greater rights, or stronger equity, than his vendor possessed.

It is said that the lien of the vendor in such a case is substantially a mortgage, and that a suit to foreclose a mortgage must be brought within the period fixed for commencing an action of ejectment to recover possession of the land. But this position is directly in conflict with the ruling of the supreme court of the United States in *Lewis v. Hawkins*, *supra*, where it is held that "the possession of the mortgagor is not adverse to that of the mortgagee," and that to apply the statute of limitations "would be like making the lapse of time the origin of title in the tenant against his landlord;" and where it is said that the lien of a mortgage "will be presumed to have been satisfied after the lapse of twenty years from maturity of the debt," unless the laches be explained, and the presumption repelled. It seems to me that this decision establishes the rule by which I must be governed as a matter of authority. It also commends itself to my mind as eminently just and reasonable.

ALEXANDER v. HORNER.

(*Eastern District of Arkansas.* April, 1879.)

1. **POWERS OF INSURANCE COMPANIES—NEGOTIABLE PAPER.**—Insurance companies have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them.
2. **PROMISSORY NOTE—PAYMENT—FRAUD.**—The maker of a note, who pays it to an indorsee and holder who obtained it by fraud, is discharged from liability thereon to the payee, unless the maker had notice of such fraud; and the discharge extends as well to the original consideration.
3. **PARTIES.**—Where, in such a case, the payee files a bill in equity to avoid the assignment and compel the maker to pay the note a second

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time, upon the ground that he had notice of the fraud, the alleged fraudulent indorsee to whom the payment was made is an indispensable party.

4. **PRACTICE — NON-JOINDER OF PARTIES.**— The objection of the non-joinder of necessary parties is not required to be raised by the pleadings; it may be made on the hearing, and it may, and in a clear case ought to be raised and acted upon by the court on its own motion.

L. E. Alexander, as receiver of the Columbia Life Insurance Company, and the company, are named as plaintiffs in the bill, which alleges that the company is a Missouri corporation; that on the eighteenth of October, 1877, it was, by decree of the circuit court of St. Louis county, adjudged to be insolvent and enjoined from doing further business, and the plaintiff, Alexander, appointed receiver of its property and assets, with authority to sue for their recovery, etc.; that pursuant to the terms of the decree, the company executed an assignment of all its property and assets to the receiver, and by the terms of the same decree the corporation was dissolved.

The bill alleges further, that on the twenty-ninth of November, 1872, the defendants were "indebted" (it is not alleged this indebtedness was for a stock subscription or how it arose) to the Mound City Mutual Life Insurance Company in the sum of \$5,830, for which sum they made their notes, payable to the company, and secured the same by deed of trust on lands in Arkansas; that the name of the last-mentioned corporation was changed successively, to Mound City Life Insurance Company, to St. Louis Life Insurance Company, and lastly to Columbia Life Insurance Company, but the corporation continued the same; that the company was insolvent on the twenty-third of November, 1875, and for some time prior to that date, and so continued until it was judicially declared to be insolvent; that on the twenty-third of November, 1875, a combination was entered into between Alfred M. Britton and George J. Davis, both of whom were directors in the life insurance company (the former its vice-president and acting president and the latter an attorney for

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the company) and the Life Association of America, to get possession of the assets of the life insurance company, by fraudulent means; that in execution of this fraudulent scheme, Britton, Davis, and the life association, in December, 1875, obtained possession of the notes of the defendants and the deed of trust given to secure the same, and cancelled and delivered them to the defendants; that the life insurance company received no consideration from Britton, Davis, or the life association for these notes, and that the defendants paid nothing for their surrender, but only gave in exchange therefor shares of stock in the company, which were worthless, because the same had never been paid for and because the company was insolvent; and that defendants had notice of these alleged facts. Horner and Horner, the makers of the notes, and who are citizens of Arkansas, and Britton, the trustee named in the deed of trust, and who is a citizen of Texas, are made defendants. Davis and the Life Association of America are not made defendants, because they are, as the bill alleges, beyond the jurisdiction of the court, and cannot be joined without ousting the jurisdiction, being citizens of the same state as the plaintiff.

Prayer for decree for amount of notes and foreclosure of deed of trust.

The defendants, answering, say the notes were given by them in payment for \$5,000 subscription to the capital stock of the company; that the stock issued to them was full paid stock; they deny all knowledge of the insolvency of the company, or of any conspiracy or fraud on the part of Britton, Davis and the Life Association of America to obtain possession of their notes; and allege that in the month of November, 1875, they were advised by another stockholder, residing in Helena, that Britton, upon whose representations they subscribed for the stock, and in whom they had confidence, was about to retire from the directory of the company; that they could then sell their stock for par, or possibly something more, to parties who were buying it up; that, after consultation, the Helena stock-

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holders reluctantly agreed to sell their stock, because they believed it was actually worth much above par if the true condition of the company could be known, and they only consented to sell for the reason that they could not be on the ground personally to ascertain and look after their interests, and believed if they did not sell some means would be resorted to to crowd them out; that thereupon they sent their certificates of shares of stock in the company, indorsed in blank, to Herman & Rainey, their correspondents in St. Louis, and authorized them to sell the same, but in no event for a less sum than would be sufficient to pay off their notes then held by the company; that their correspondents afterwards advised them that they had sold their stock to George J. Davis, and taken in payment their notes due to the company and \$176.80 in money, and inclosed a check for that sum, and their notes duly assigned by the company to Davis, and by him cancelled, and also a deed of release of the deed of trust, executed by Britton, the trustee; that they never heard of George J. Davis until they saw he was the assignee of their notes, and were informed by their correspondents that he had purchased their stock; that they believed the company was solvent, and would not have sold their stock for less than par; that they acted in good faith, and had no suspicion of any fraud, or that fraud was charged upon any one in connection with the transaction, until the filing of the bill in February, 1878, more than three years afterwards; and these allegations of the answer are well supported by the evidence.

It is shown by the evidence that on the twenty-third of November, 1875, the Life Association of America entered into a contract with George J. Davis, by which the former agreed to purchase from the latter nine thousand four hundred shares of the capital stock of the St. Louis Life Insurance Company, and as much more, up to ten thousand shares (the whole capital stock of the company), as Davis might transfer and deliver within thirty days. Contemporaneously with the delivery of the stock of the insurance company, Davis was

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also to deliver to the life association certain other stocks and securities mentioned in the contract, then owned by the insurance company.

Davis was to receive for the nine thousand four hundred shares and other securities \$1,215,000, and par value for all shares delivered in excess of that number. The mode of paying Davis for this stock and securities was prescribed with some detail, the substance of which was, that about ninety per cent. of the sum was to be paid in the draft of Hough, president of the life association, on the life association, and accepted by it, payable at one day's sight, and the remainder in cash, on delivery of the stock and other securities mentioned in the contract.

Having made this contract with the life association, Davis resigned as a director of the insurance company, and on the thirtieth of November, 1875, made a proposition to the life insurance company to purchase from it the securities mentioned in his contract with the life association at prices stated in his proposition; and at a meeting of the board of directors of the life insurance company on that day, the record shows the following proceedings were had:

"Mr. Davis then submitted a list of securities belonging to the company which he desired to purchase, the price being satisfactory, and for payment of which he would give the draft of H. W. Hough, president, on the life association to his (Davis') order at one day's sight, and accepted by said life association. After an examination of the list and full discussion thereof, the following resolution, offered by Mr. Bogy, was adopted:

"*Resolved*, That the vice president be authorized to sell and deliver to Mr. George J. Davis the following securities, or any one or all of said securities, at the price named in the list hereto appended, and that the vice president be authorized to receive in payment for the securities so sold and delivered, the draft of H. W. Hough, president, drawn at one day's sight, to the order of G. J. Davis, and by him indorsed on the

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Life Association of America, and by said life association accepted." Then follows a list of the securities sold (which are the same mentioned in the contract between Davis and the life association), with prices annexed to each, amounting in the aggregate to \$1,111,898.34. Among the securities thus sold to Davis were the notes of the defendants, which were afterwards duly indorsed by the insurance company and delivered to him. Davis having delivered the stock and other securities to the life association under the contract of November 3, 1875, received in payment some cash and the draft of the life association for \$1,111,898.34. This draft Davis indorsed and delivered to the insurance company on the tenth of December, 1875.

In the proceedings of the board of directors on that day, it is set forth that the president of the company stated to the board for its information, "that Mr. G. J. Davis had tendered him this day the draft as specified in the resolution of the board, passed November 30, in the sum of \$1,111,898.34, and that in accordance with the authorization of said resolution he had sold and delivered to Mr. Davis the securities named." At the conclusion of this transaction the directory of the insurance company resigned, and the life association, now the holder of the stock of the former company, elected a directory composed mainly, if not altogether, of the same persons who constituted the directory of the life association.

In 1876, by an amendment of its charter approved by the superintendent of the insurance department of the state, the name of the company was changed to the Columbia Life Insurance Company, and it was authorized by a two-thirds vote of its board of directors to reduce the capital stock of the company, then ten thousand shares of the par value of \$100 each, to any amount not less than \$100,000. To effect this reduction, the surplus assets of the company might be used to purchase in the stock of the company. Under this authority the directory resolved on a reduction of nine thousand shares of the capital stock, and to effect the reduction, set aside \$900,000, alleged

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surplus funds, and afterwards purchased that number of shares at par — \$900,000 — from the life association, and paid therefor by cancelling that amount of the draft of the life association given by it to Davis, and by him indorsed to the life insurance company under its contract for the purchase of its securities. The balance of that draft, viz.: \$211,898.34, was liquidated by cash payments and other transactions between the companies.

The life insurance company continued to be a going concern until it was adjudged to be insolvent. The evidence is conflicting as to whether it was, in fact, a solvent institution in December, 1875, but it was reputed solvent and to be doing a profitable business, and its stock was then worth par in the market.

The life association is still a going concern. The superintendent of the insurance department, in the proceedings in which the company was adjudged insolvent, made no complaint against the reduction of the stock of the company nor the sale of its securities to Davis; nor has the company or any stockholder or creditor, or the receiver, had these transactions annulled by a direct proceeding for that purpose, or taken any steps to that end, so far as this record shows.

The bill does not allege, nor do the proofs disclose the condition of the company, otherwise than generally that it is insolvent; nor are the equities of any of the creditors disclosed; nor does the bill offer to surrender up to defendants the shares of stock they sold to Davis, or make any suggestion in relation thereto, other than that it is worthless.

W. W. Smith and Smith & Collins, for plaintiff.

Tappan & Horner, for defendants.

CALDWELL, *District Judge*.—The board of directors of the insurance company had an undoubted right to sell the defendants' notes and other securities to Davis, and authorize its secretary to indorse them as was done. Banks, insurance

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companies, and other like corporations, have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them. *Hardy v. Merriwether*, 14 Ind. 203; *McIntire v. Preston*, 5 Gilm. 48; *Nichols v. Oliver*, 36 N. H. 218; *Spear v. Ladd*, 11 Mass. 94; *Northampton Bank v. Pepoon*, id. 288; *Lester v. Webb*, 1 Allen, 34. The notes were negotiable, and their assignment and delivery invested Davis with the legal and equitable title to them and the right to receive payment and cancel them. He did receive payment from the makers — the defendants — in shares of stock in the company, then worth par in the market, and cancelled and surrendered up the notes to them.

The amended answer and the deposition of J. J. Horner make it certain that the defendants, in this case, had no knowledge or suspicion personally, or through their agents, that Davis had obtained their notes by fraud, or that there was any infirmity in his title; and, having paid the notes in good faith to Davis, the indorsee and holder, the plaintiff cannot compel the defendants to pay the notes a second time, even if Davis was a fraudulent holder. Payment to the thief or finder himself, of a negotiable note transferable by delivery, will discharge the maker, provided such payment was not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. Byles on Bills, 213. Nothing short of fraud, not even gross negligence, if unattended with *mala fides*, will invalidate the payment so as to take away the rights founded thereon. Story on Bills, § 416; Edwards on Bills, § 537.

The bill counts upon the notes exclusively; it does not seek a recovery upon a stock subscription, nor does it even allege that the notes were stock notes. The answer discloses that the notes were given for a subscription to the capital stock of the company, but that fact did not render the notes any the less negotiable, or prevent the company from negotiating

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them, or excuse the defendants from paying them to the indorsee and holder; and when paid in good faith to the holder, the company can have no claim against the makers, either upon the notes or for the original consideration.

It is not true the defendants paid nothing of value for the notes. The shares of stock owned by the defendants were issued as full paid shares; the stock was then worth par in the market; the defendants refused to sell it for less, and Davis agreed to give par for it. The test is its then market value, and not what it was really worth in the light of subsequent events.

The company having indorsed and transferred the notes to Davis, it is not open to it to object that he discharged the debt for an inadequate consideration, if the defendants had no notice of the alleged fraud and acted in good faith. If Davis had been a *bona fide* holder of the notes, he could not successfully maintain that they had not been fully paid, and no more can the company.

The bill is fatally defective for want of proper parties. The *gravamen* of the plaintiff's bill is that Davis and the life association, acting in concert, fraudulently procured the assignment and transfer of the defendants' notes from the company to Davis. It is not alleged in the bill, nor was it claimed in argument, that defendants were parties to that fraud; it is claimed that their agent only had notice of it before paying the notes.

Obviously the plaintiff has no case unless he can impeach and set aside the sale and transfer of these securities to Davis. Davis ought to be a party to any bill seeking to do this. He is entitled to an opportunity to repel the imputation of fraud, and protect himself from liability if he can do so; the defendants are entitled to his aid in defending the action; and as he would be liable over to the defendants, in the event of the plaintiff's recovering, he must be made a party for the protection of the defendants, and to avoid multiplicity of suits. *Robertson v. Carson*, 19 Wall. 94.

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The defendants have a right to insist that Davis shall be brought in; and on the averments in the bill the life association also, because if they are compelled to pay their notes a second time they are entitled to an action over against these parties, to be reimbursed the amount paid them or Davis in satisfaction of their notes, which would be the par value of their stock, that being the market value as well as the agreed value between Davis and the defendants. But as Davis and the life association are not made parties, it would be open to them in any suit that the defendants might bring against them to be reimbursed the amount of plaintiff's recovery, to contest the question of fraud in the transfer of these securities to Davis, and it might result that the court or jury trying that issue would find the transfer was not fraudulent, and thus the defendants would be wronged in a mode that would leave them no redress. Equity will not permit a plaintiff to put a defendant in this predicament. The rule is well settled that where, in the event of the plaintiffs succeeding, the defendants will be subjected to undue inconvenience, or to danger of loss or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court; or will thereby acquire a right to call upon the absent parties either to reimburse him the whole or a part of the plaintiffs' demand; then such absent parties must be brought before the court in order that the rights and liberties of all may be settled by one proceeding and a multiplicity of suits avoided, with a possible different determination of the same issue, to the irreparable injury of the defendant sued. Story's Eq. Pl. secs. 136, 138; 1 Daniel's Ch. Pl. & Pr. 281, 282; *Robertson v. Carson*, 19 Wall. 94; *Milroy v. Stockwell*, 1 Carter (Ind.), 35.

Anticipating this objection, and with a view to avoid it, the plaintiff alleges in his bill that Davis and the life association are beyond the jurisdiction of the court and citizens of the same state as the plaintiffs, and cannot therefore be made parties without ousting the jurisdiction of the court. The learned

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counsel for the plaintiffs argued earnestly that these averments, under the act of congress of February 28, 1839 (sec. 737, R. S.), and the 47th equity rule, dispensed with the necessity of making these parties defendants.

This argument has often been made before, and always unavailingly in a case like this. The supreme court of the United States have divided parties to suits in equity into three classes: (1) formal; (2) necessary or proper; and (3) indispensable. The first two classes may be dispensed with; the third, never. The absent parties in this case are indispensable parties, as that term is defined and applied by the supreme court. The act of congress and the 47th rule effected no change of the law on this subject of parties to suits in equity.

In the leading case upon this subject the supreme court say: "The act of congress does not affect any case where persons are not joined because their citizenship would defeat the jurisdiction; and so far as it touches suits in equity it is no more than a legislative affirmance of the rule previously established by the decisions" of that court. "And the 47th rule is only a declaration for the government of practitioners and courts, of the effect of this act of congress and of the previous decisions of the court on the subject of that rule. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting these rights, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How. 130. And in a late case the court say: "The act of congress of 1839, and the rule of this court upon the subject, give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with." *Ribon v. Railroad Co.*, 16 Wall. 450; and the rule established in these cases has been

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affirmed, illustrated and applied in many other cases. *Kendig v. Dean*, 97 U. S. 423; *Florida v. Georgia*, 17 How. 508; *Coiron v. Millaudon*, 19 How. 115; *Barney v. Baltimore City*, 6 Wall. 284; *Florence Sewing Machine Co. v. Singer Manuf'g Co.*, 8 Blatch. 127; *Tobin v. Walkenshaw*, 1 McAlister, 26; *Litchfield v. The Register & Receiver*, 1 Woolworth, 299. The ruling in *Robinson v. Carson*, 19 Wall. 94, is directly in point in this case, and concludes the question.

Counsel for plaintiff urge that the rules as to parties in equity are somewhat flexible; that the 47th rule in terms empowers the courts to dispense with "necessary or proper parties, in their discretion;" and attention is called to the case of *Elmendorf v. Taylor*, 10 Wheat. 152, where it is said the objection for want of parties does not affect the jurisdiction, but addresses itself to the policy of the court, and is subject to its discretion.

Neither the rule nor the case cited touch the question of indispensable parties; the term itself implies they can never be dispensed with. And the absent persons in this case belong to that class, and not only cannot be brought in on account of their common citizenship with the plaintiff, but they would not be permitted to come in; and in all such cases the court cannot act at all, but will leave the parties to terminate their dispute by other means. *Florida v. Georgia*, 17 How. 508; *Florence S. M. Co. v. Singer Mun. Co.*, 8 Blatch. 127; *Kendig v. Dean*, 97 U. S. 423.

And if the absent persons were not indispensable parties but only "necessary or proper," and if the 47th rule invested the court with the discretion to proceed or not with the case in the absence of such parties, there is nothing in the case calling for an exercise of that discretion favorable to the plaintiff, but the reverse, as will be seen from a brief *resumé* of the case.

The bill only seeks to set aside the contract between Davis and the company so far as it concerns the defendants' notes; it does not seek to set aside the contract as to the other

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securities embraced in it; nor does the plaintiff offer to repay what the company received in cash on this sale of its securities or any part of it; or to surrender back to defendants their stock; or to place any of the parties in *statu quo*, nor does it seek to annul the subsequent action of the company by which it blotted out of existence nine-tenths of its capital stock, including the shares formerly owned by the defendants, and which reduction was effected by using as cash the draft received from Davis on the life association. The validity of the company's action in reducing its stock \$900,000 by the purchase of nine thousand shares from the life association and its cancellation ought to be determined before any relief is granted; for if that action was valid, it amounted to a ratification of all that had gone before, and the company ought not to be heard to assert that Davis did not pay value for the securities transferred to him when it appropriated and used the draft received from him as money. But that transaction cannot be inquired into in this case, because the bill does not attack, or even refer to it; and if it did the indispensable parties to its determination are not before the court.

Passing by the originators, actors and participants in the alleged fraud, all of whom are citizens of the same state as the plaintiff, and solvent, so far as the record discloses anything on that subject; affirming the sale of the company's securities to Davis, so far as it profited by it; keeping all that was obtained by that transaction and the subsequent operations based on the fruits of that transaction; the plaintiff seeks a recovery against defendants, admittedly innocent of any participation in the alleged fraud, by proceeding in a mode that would deprive them of that sure recourse on the actual parties to the alleged fraud, to which they would be entitled, and in a mode that would probably result in exempting the actual perpetrators of the fraud from liability altogether.

A plaintiff occupying this attitude has no claims to the favorable exercise of an equitable discretion on the subject of parties, if such discretion exists, which is not decided.

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Objection for the non-joinder of necessary parties need not be taken by demurrer, plea or answer; it is open to the defendant to make it any time; and it may, and in a clear case ought to be raised and acted upon by the court on its own motion.

These conclusions render it unnecessary to decide whether the transactions between Davis and the life association and the life insurance company were or not fraudulent, or to rule upon the other questions presented at the hearing.

Decree dismissing bill without prejudice.

PACIFIC RAILROAD v. MISSOURI PACIFIC RAILWAY COMPANY
and others.

(*Eastern District of Missouri. September, 1880.*)

1. JURISDICTION — SUBPŒNAS — SERVICE. — A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpœnas upon persons without the territorial jurisdiction of the court.
2. SAME — SAME — SAME — SOLICITORS. — The service of subpœnas on solicitors and attorneys of persons before the court in the former suit is of no validity until an application to the court has first been made, setting forth the circumstances which render such service proper, and an order obtained from the court directing that service be made, and that such service, when made, should answer as a substitute for actual service on the parties so represented by the attorneys or solicitors.

Motion to vacate service of process.

Glover & Shepley, for complainant.

Melville C. Day, for defendants.

MILLER, *Circuit Justice (orally)*. — The case in which the motion is made that we are about to decide is a suit brought in the circuit court of the United States for the eastern district of Missouri, to set aside a decree and sale of the Missouri

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Pacific Railroad, made upon a proceeding to foreclose a mortgage upon that road. In addition to the Missouri Pacific Railroad Company, and some persons who were also parties in that suit, the present bill makes parties of the purchasers at the sale, and several other individuals who were not parties to the former suit. Some of these are not citizens or residents of the state of Missouri, and have not been found within the district. The subpoenas were issued, and, in some cases, services had on these persons in the state of New York, and in the state of New Jersey; and service has also been made, without any previous authorization of the court, on the attorneys and solicitors in the former suit, of some of the defendants in the present suit. The motion is to vacate and set aside all these services.

The argument by which it is endeavored to support the service of process upon persons without the district, is that the present suit is one that is auxiliary to the former suit, in which the decree of foreclosure was had; that it is so far merely a continuation of that suit; and that it is not a new and original suit in the sense that requires process to be restricted to those who have the requisite citizenship in ordinary suits in the federal courts. It may be conceded, for the purposes of this motion, that it is to a certain extent auxiliary to the original foreclosure suit, and that proceedings to set aside that decree, and to set aside also the sale of the railroad under that decree, can only be instituted in the circuit court of the United States in which that decree was rendered. But it also partakes so far of the nature of an original suit that the parties who are here contesting service of this process cannot be brought before the court by anything short of a subpoena in chancery; and cannot be compelled to answer and respond to the allegations of the present bill in any other mode than in the mode usually adopted in original chancery bills.

The argument that in such a case as this a subpoena in chancery can be issued so as to run beyond the territorial limits of the jurisdiction of the court, and be validly served

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beyond that jurisdiction, overlooks two important propositions.

1. It is of the essence of the power and jurisdiction of all courts that their process is of no validity beyond the territory in which the court sits and to which its jurisdiction extends. If, therefore, there is no other statute on the subject than simply that the circuit court of the United States for the eastern district of Missouri shall have jurisdiction co-extensive with the limits of the district, it would follow logically from this limitation upon the inherent power of all courts that its process shall be of no validity beyond its territorial lines. There is nothing in any statute of the United States that gives to the process of the circuit court of the United States, in a civil case, any power to bring a party within the jurisdiction of that court when he is not in and cannot be served within the limits of the territory.

2. On the contrary, section 739 of the revised statutes, which represents the law as it has been ever since 1789, provides "that no civil suit shall be brought before either of said courts (meaning the circuit and district courts of the United States) against any inhabitant of the United States by any original process in any other district than that in which he is an inhabitant, or in which he is found at the time of serving the writ." The exception to that found in the same section is in suits of a local nature, in a state which contains more than one district, the process may run to any point within the state.

Section 738 of the revised statutes declares that "when any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill, at a certain day, to be therein designated;" and the statute then proceeds that the court may

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direct service of this order by publication, or by actual personal service on the party. But this section does not authorize the issuance of the process, either of summons or subpoena in chancery, to be served beyond the limits of the jurisdiction of the court. And the present case derives no aid from it if it did, because this is not a suit to enforce any legal or equitable lien or claim against real or personal property. These very exceptions, however, to the general rule of law, that the process of a court does not extend beyond its territorial limits, and to the statute, which requires that no suit shall be brought against any person in any other district than that of which he is an inhabitant or found at the time of serving the writ, go themselves to prove the strength and extent of the rule of limitation.

We are of opinion, therefore, that there is no law which permits a subpoena in chancery to issue on the present bill, to whoever it may be directed, to be served upon a party who is neither an inhabitant of the state of Missouri, nor found within the district in which the suit is pending.

As regards the subpoenas served on solicitors and attorneys of persons before the court in the former suit, the course of procedure in such cases has been well settled by the former practice of the court; and that is that, before such service can be of any validity, an application to the court must be made, setting forth the circumstances which render such a service on the attorney or solicitor proper, and the order obtained from the court directing that service be made, and that such service, when made, shall answer as a substitute for actual service on the party so represented by the attorney.

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BONA FIDE PURCHASER. See *Equity*, 10.

BRIDGES.

1. BRIDGES—MISSISSIPPI AND MISSOURI RIVERS—SECTION 2, ACT OF CONGRESS OF JULY 25, 1866—PASSAGE WAY BETWEEN PIERS—WIDTH OF.—Section 2 of the act of congress of July 25, 1866, authorizing the construction of bridges across the Mississippi river and across the Missouri river at Kansas City, construed as requiring that the passage way for vessels between the piers of any draw-bridge built under said act shall be 160 feet wide in the clear, measured by a line running directly across the channel, and at right angles with the piers of the bridge. Where a bridge is built diagonally across the river, a measurement along the line of the bridge is not the proper measurement. *The Missouri River Packet Co. v. The Hannibal & St. Joseph Railroad Company*, 281
2. SAME—SAME—GRANT, WHEN NO PROTECTION.—The fact that a bridge has been constructed under said act of congress does not render it a legal structure, except in so far as it conforms to the terms and limitations of the act. If the powers granted by the act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. *Id.*
3. SAME—BRIDGE CONSTRUCTED WITH TOO NARROW A PASSAGE WAY—PASSING VESSEL—LIABILITY OF OWNER.—Although the width between the piers of such a bridge may be less than the act of congress requires, yet this will not render the owner of the bridge liable for damages to a passing vessel unless the unlawful structure caused or contributed to the injury. *Id.*
4. SAME—SAME—SUNKEN PONTOON CONTRIBUTING TO VESSEL'S INJURY.—Where it was alleged that a sunken pontoon, placed and kept in the channel by the defendant, had caused a change in the current of the river which had thrown plaintiff's vessel over against a pier of defendant's bridge, and that the accident was the result of two causes combined, to wit, the presence in the channel of the pontoons and of the bridge pier, both unlawful structures; *held*, that these facts being established plaintiff could recover. *Id.*

5. **NAVIGABLE STREAMS — WRECK IN — CHANGE OF CURRENT — LIABILITY OF ONE CAUSING.**—Those navigating the river are under no obligation to remove wrecks which may be made in the ordinary and proper course of navigation, but he who, for his own benefit, uses any part of a navigable river, is liable in damages to any party injured, if such use causes a change in the ordinary course of the channel. *Id.*
6. **SAME — SAME — DUTY TO REMOVE.**—If the defendant had a right to keep the pontoon in the river in connection with the bridge, and it was sunk by unavoidable accident, defendant was entitled to a reasonable time in which to raise and remove it, but was not at liberty to leave it in the channel for an indefinite period. *Id.*
7. **COLLISION — CONTRIBUTORY NEGLIGENCE — INSTRUCTION AS TO.**—An instruction to the effect that if the plaintiff has proved the facts necessary to make out his case, he must recover, "unless unskillfulness or neglect on the part of plaintiff in handling his boat caused or contributed to the collision," *held*, a sufficient charge on the subject of contributory negligence. *Id.*
8. **NAVIGABLE STREAM — OBSTRUCTIONS IN — PARTY NOT ENTITLED TO NOTICE TO REMOVE.**—A person who places an obstruction in the navigable channel of a river is not entitled to notice to remove the same, or to abate the nuisance caused thereby. *Id.*
9. **VESSEL — COLLISION WITH BRIDGE — MEASURE OF DAMAGES.**—The true rule of damages in suit for injuries done to a vessel by collision is, that the plaintiff shall recover the loss necessarily incurred in repairing the injured vessel, and also for the use of the boat during the time necessary to make the repairs and fit her for business. *Id.*

CAPITAL STOCK. See *Corporation*, 10.

CERTIFICATE. See *Practice*, 10.

CESTUI QUE TRUST. See *Bonds*, 4.

CIRCUIT JUDGE. See *Injunction*, 1.

CITY ORDINANCE. See *Corporation*, 17.

CLERK. See *Sale*, 7.

CODICIL. See *Will*, 1, 2.

COMMON CARRIER.

1. **COMMON CARRIER — LIABILITY BEYOND ROUTE.**—In the absence of a special contract the liability of a common carrier does not extend beyond the terminus of his own route. *Stewart v. Terre Haute & I. R. R. Co.*,
812

2. **SAME — SAME — EVIDENCE.**— Such contract is not established, however, by proof that the carrier accepted the goods with knowledge of their destination, and named the through rate for the same. *Id.*

CONFIRMATION. See *Sale*, 2, 3.

CONSIDERATION. See *Vendor's Lien. Warranty*, 2.

CONSOLIDATION. See *Corporation*, 5.

CONTRACT. See *Pleadings*, 6, 8, 13. *Taxation*, 3. *Bonds*, 1, 2, 3, 4. *Corporations*, 24, 25, 26, 28, 29. *Pacific R. R. Co.*, 6. *Mortgages*, 20. *Statute*, 2, 3, 4.

1. **CONTRACT — MENTAL CONDITION.**— Facts upon which it was held the mental condition of a party was such as to incapacitate him to enter into a valid contract. *Kilgore v. Cross & Diver*, 144
2. **SAME — IMPOSITION — EQUITABLE RELIEF.**— Against the consequences of mistaken judgment, or mere imprudence and folly on the part of one making a contract, courts can grant no relief. But the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented or overcome by cunning artifice or undue influence. *Id.*
3. **SAME — EXERCISE OF REASONING FACULTIES.**— A party is not bound by a contract entered into when his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties. *Id.*
4. **SAME — INCAPACITY — EXPERT TESTIMONY.**— Opinions of witnesses not experts are competent evidence on the question of capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which they found their opinions. *Id.*
5. **CONTRACT — FRAUD — EQUITABLE RELIEF.**— It is not always necessary for the injured party, even when fraud taints the contract, to rescind it in order to resist its full operation. He may permit the contract to be amended so as to conform to fair dealing, and if, under the pleadings and the relief prayed, a court of chancery can enter a decree which would be just and fair, and in accordance with equity, it will do so. *Elfelt v. Hart*, 11
6. **CONTRACT — FRAUD — RATIFICATION.**— Inexcusable delay will operate as a ratification of a fraudulent contract. *Cummins, Assignee, etc. v. Lods and others*. 340
7. **CONTRACT — PARTIES — RAILROAD — DIRECTORS.**— A contract between a railroad and a construction company is void where any of

the directors of the railroad are members of the construction company. *Thomas, Trustee, v. The Brownsville, Fort Kearney & Pacific Railway Co. and others,* 392

8. **SAME — ESTOPPEL — RATIFICATION.**—The stockholders of the railroad are not estopped by long acquiescence in such contract, nor can the same be ratified by a board of directors composed in part of members of the construction company. *Id.*
9. **SAME — EQUITABLE RELIEF — PUBLIC POLICY.**—Public policy will not permit a court to grant equitable relief under such contract, where it further appeared, upon the face of the contract, that each director of the railroad received a pecuniary consideration for entering into the contract. *Id.*
10. **CONTRACT — ULTRA VIRES.**—The Central Branch Union Pacific Railroad Company was authorized by act of congress to construct a railroad and telegraph line, as a part of the Union Pacific Railroad system, for one hundred miles west of the Missouri river, upon the same terms and conditions, in all respects, as were provided for the construction of the railroad and telegraph line of the Union Pacific Railroad Company. *Held*, that a contract by such railroad with a telegraph company, whereby it divested itself of the right to manage and control the telegraph line and fix rates thereon, was *ultra vires* and void. *The Central Branch Union Pacific Railroad Co. v. The Western Union Telegraph Co.,* 551
NOTE.—*Atlantic & Pacific Telegraph Co. v. Union Pacific Ry Co.,* followed. 541
11. **SAME — SAME — RESTITUTION OF PROPERTY.**—Where the railroad retook possession of such telegraph line, accompanied with legal proceedings to have the contract declared null and an account taken, the telegraph company cannot compel a restitution of the property under the contract pending such proceedings. *Id.*
12. **ILLEGAL CONTRACT — REMEDY — INJUNCTION.**—A court of equity will enjoin the seizure of property and the ejectment of the possessor, although the same may have been acquired under an illegal contract, until an application has been made for the cancellation of such contract, and a full and fair settlement of all accounts growing out of its execution in the past. *The Western Union Telegraph Company v. The St. Joseph & Western Railway Company and others,* 565
13. **CORPORATION — RATIFICATION.**—A corporation, like an individual, may ratify by its acts the terms of a contract by which it would not, without such ratification, be bound. *Id.*
14. **CONTRACT — SPECIFIC PERFORMANCE — INJUNCTION.**—Although specific performance of a contract requiring the performance of continuous duties will not be enforced, a court of equity will, nevertheless, enjoin its violation. *Id.*

CONTRIBUTORY NEGLIGENCE. See *Bridges*, 2.

CONVEYANCE. See *Husband and Wife*, 1.

1. **VOLUNTARY CONVEYANCE—EFFECT OF.**—A voluntary conveyance, without consideration, will vest an absolute title in the grantee, subject only to the rights of creditors. *Atwater and others v. Seely and others (Seely and others v. Atwater and others)*, 264
2. **CURATIVE ACT—DEEDS.**—The act of February 28, 1877 (Minnesota), legalizing deeds executed in another state, according to the laws of such state, is a valid "healing statute," and, as to a deed covered by it, operated to validate the same, and pass the legal title, except as to intervening rights. *Id.*
3. **DEED—INSUFFICIENT TO PASS LEGAL TITLE.**—A deed in Minnesota, executed in another state according to the laws thereof, but insufficient under the laws of the state where the lands are situated, will operate as a transfer of the equitable rights of the grantee. *Id.*
4. **VOLUNTARY CONVEYANCE—PARENT AND CHILD—FRAUD.**—A voluntary conveyance from a parent to his children, by way of settlement, while solvent and free from debt, and not disproportionate to his means, will be sustained as against subsequent creditors in the absence of fraud. *Herring, Assignee, etc., v. Richards and others*, 570
5. **SAME—SUBSEQUENT IMPROVEMENTS—FRAUD.**—Subsequent contributions of money, for the purpose of paying off incumbrances and improving the property, will not render such conveyance void. *Id.*
6. **SAME—PRESUMPTION OF ACCEPTANCE.**—In the absence of direct testimony the acceptance of the grant will be presumed, after the expiration of four years, where the grantees held, owned, controlled and managed the property from the time of the conveyance, and the only occupancy had been by their tenants, and for their sole and exclusive use. *Id.*
7. **DEED—DELIVERY TO RECORDER.**—Where a deed is delivered by the grantor to the recorder for record, the acceptance of the grantee will be presumed in the absence of proof, if the grant be beneficial to him. *Id.*
8. **SAME—SAME—ACCEPTANCE.**—And a subsequent acceptance will relate back to the date of the conveyance except as against intervening attachment or execution creditors. *Id.*

CORPORATION. See *Contract*, 18. *Pleading*, 9. *Pacific R. R.*, 3. *Taxation*, 2. *Bonds*, 1, 2.

1. **CORPORATION—CONTRACT ULTRA VIRES.**—The powers of corporations organized under statutes are such, and such only, as those statutes confer, including implied as well as express powers. *American Union Telegraph Co. v. The Union Pacific R. R. Co.*, 188

2. **SAME.** — A contract in excess of the powers conferred, or, in case of a *quasi* public corporation like a railroad company, a contract which disables the corporation from performing its duties to the public, is void. Hence a corporation cannot alienate any franchise or any property necessary to perform its obligations and duties to the state, without legislative authority. *Thomas et al. v. West Jersey R. Co.* (101 U. S. 71), followed. *Id.*

3. **SAME — CONTRACTS ULTRA VIRES.** — Certain contracts entered into by the Union Pacific Railroad Company, assigning a large part of its franchise, and alienating property which was necessary to the performance of its obligations and duties to the government and to the public, held *ultra vires*. *Id.*

4. **SAME — INJUNCTION.** — Although a contract may be *ultra vires*, if it has been executed in whole or in part, neither party to it will be permitted to rescind it of his own motion, and to recover, without process of law, and by force, the consideration paid or property acquired under the contract; and in such a case a corporation that has received a large consideration for a contract *ultra vires* for the sale of a telegraph franchise, will be restrained from resuming possession of said franchise and the property connected therewith, until an accounting and settlement can be had between the parties. *Id.*

5. **CORPORATIONS — EFFECT OF CONSOLIDATION.** — The usual effect of the consolidation of two railway companies is to extinguish the two constituent companies and make of them one new company. *Clearwater v. Meredith*, 1 Wall. 25; *Tomlinson v. Branch*, 15 Wall. 460. *Ridgway Township v. W. D. Griswold et al.*, 151

6. **SAME — STOCKHOLDER.** — A stockholder in one of the original constituent corporations becomes, upon the consolidation being perfected, a stockholder in the new company, and the new company, unless otherwise provided, succeeds to the duties as well as to the rights of the old. A bill brought by a stockholder after the consolidation, upon the theory that he is a stockholder in the *old* company, held not to be maintainable. *Id.*

7. **MUNICIPAL CORPORATION — CORPORATE BONDS.** — Where a city has power to subscribe to the stock of a railroad company and to issue bonds in payment of the subscription, the proceeds of such bonds in all cases to be expended within the limits of the county in which such city is situate, held, that as between the city and the railroad company, or its assignee with notice, such bonds cannot be enforced where no part of the proceeds of the subscription has been expended in the county, and no part of the railroad subscribed to has been constructed therein. *Chas. B. Foots v. The City of Mount Pleasant*, 101

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8. **FORECLOSURE OF MORTGAGE UPON A RAILROAD—RIGHTS OF PURCHASER.**—The owner of certain first mortgage bonds upon the K., Mt. P. & M. Railroad, including all its "property, real or personal, and all rights and interests therein now owned or hereafter to be acquired," proceeded to foreclose the mortgage, and obtained decree under which he purchased the property. The mortgage provided that the bonds secured by it should in no case be issued or disposed of except at the rate of \$8,500 for every mile of road *as completed*. *Held*, that as to the bonds issued by the city of Mt. Pleasant, under the circumstances named above, the purchaser at sale under the decree did not become a *bona fide* holder, with right to sue and recover. *Id.*
9. **DECISIONS OF HIGHEST STATE COURT AS TO VALIDITY OF MUNICIPAL BONDS.**—The supreme court of the United States has held that bonds issued while a decision of the supreme court of Iowa, holding in favor of the power of the corporation to issue the same, remained in force, will be upheld as valid, notwithstanding a later decision the other way; but as to bonds issued after the promulgation of the later decision, the supreme court of the United States will accept and follow the decisions of the supreme court of this state. *Id.*
10. **CORPORATION—CAPITAL STOCK.**—The capital stock, property and assets of a corporation are to be deemed a trust fund sacredly pledged for the payment of the debts of the corporation. *Union National Bank of Chicago v. George Douglass*, 86
11. **SAME—RIGHT OF CREDITOR TO FOLLOW PROPERTY OF CORPORATION.**—Equity recognizes the right of a creditor of a corporation to pursue the property of the corporation into whose possession soever it may be transferred, unless it has passed into the hands of a *bona fide* purchaser. Stockholders are not entitled to any share of the capital stock nor any profits until the debts of the corporation are all paid. *Id.*
12. **SAME—DIRECTOR, STOCKHOLDER.**—Where a director, who was also a stockholder, of an indebted corporation, as director aided in the passage of a resolution by which, as stockholder, he appropriated certain bonds which were assets of the corporation to his own use,—*held*, that he was liable to the creditors, as trustee, for the value of such bonds. *Id.*
13. **MUNICIPAL CORPORATION—VOID BONDS—APPLICATION OF MONEY.** Where a city without power to make negotiable obligations sells its void bonds, and, receiving the money therefor, applies it to its legitimate corporate uses, an action will lie to recover the money so received and applied. *Gause v. City of Clarksville*, 78
14. **SAME—ASSIGNMENT OF BONDS—ACTION BY ASSIGNEE.**—The right

- to recover money so received is transferred by the transfer of the bonds, and can be enforced by the last holder of such bonds as the assignee thereof. *Wood v. Louisiana* (MS.), U. S. Circuit Court, Eastern District Missouri, September term, 1878, affirmed. *Id.*
15. **SAME — VOID BONDS — ACTION BY HOLDER.**— Where a bond is made by a city for two considerations, as to one of which it has power to make a bond, but as to the other has none, such bond is wholly void. The holder cannot recover on the bond as such. His remedy is an action for money had and received. *Id.*
16. **VALID BOND SURRENDERED FOR VOID BOND — ACTION ON SURRENDERED BOND.**— Where the holder of a valid bond presents it when due to the maker, and receives in payment a renewal bond, which for any reason is void, then the old bond, though surrendered for cancellation, is not extinguished, but recovery may be had on it the same as if the new bond had not been given. *Id.*
17. **CITY ORDINANCE — ISSUE OF BONDS — RECITAL — ESTOPPEL.**— A city ordinance, authorizing a subscription to stock of a road company and issue of bonds to pay the same, recited that the authority prescribed by the law as a prerequisite of such subscription had been given by an election held for the purpose. In a suit upon such bonds, *held*, that the city was estopped by such recital to show that the voters at such election were not duly sworn, and the election therefore void. Principle of estoppel by recitals in bonds applies to recitals in an ordinance authorizing the issue of bonds. *Id.*
18. **PLEA IN ABATEMENT — JURISDICTION — CAPACITY TO SUE.**— All matters which go to challenge the jurisdiction of the court, or the capacity of the plaintiff to sue, should be presented by plea in abatement, in advance of hearing on the merits. *Id.*
19. **CORPORATION — ASSIGNEES OF STOCK CERTIFICATES — SHAREHOLDERS — TRANSFER UPON THE BOOKS OF THE CORPORATION.**— The assignees of stock certificates in a corporation, by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignment, shareholders, when the transfer of shares is required to be made upon the books of the company. *Becker and others v. The Wells Flouring Mill Co. and others*, 63
20. **SAME — SAME — EVIDENCE AS TO CHARACTER OF ASSIGNMENT.**— Evidence is admissible in behalf of the corporation to show the true character of such assignment, in order to determine the relation of the assignees. *Id.*
21. **SAME — SAME — ULTRA VIRES — INJUNCTION.**— An injunction will be refused, upon the prayer of such assignees, for the purpose of restraining such corporation from holding a meeting in order to increase the corporate debt, or from increasing such debt until the

stock in controversy has been transferred to the assignees upon the books of the company, or from voting upon the stock thus assigned, where it appears that the stock was merely pledged by the assignment of the certificates, and it was manifest that the proposed increase of the corporate debt was not *ultra vires*. *Id.*

22. CORPORATION — SUBSCRIPTION — PAYMENT.— A corporation whose charter and by-laws require each subscriber to its capital stock to pay a given percentage of his subscription in cash at the time of subscribing, cannot enforce payment of a subscription where the required cash payment has not been made. *State Ins. Co. of Missouri v. Redmond, Assignee, etc.*, 308
23. CORPORATION — POWER TO ASSIGN FRANCHISE UNDER ACT OF CONGRESS OF JULY 2, 1864.— The United States Telegraph Company had power to assign and transfer to plaintiff its right derived from act of congress July 2, 1864, to construct a line of telegraph along the line of the Kansas Pacific Railroad, and the amended bill shows that such assignment was duly executed. *The Western Union Telegraph Company v. The Union Pacific Railway Company and others*, 558
24. ILLEGAL CONTRACT DOES NOT AFFECT PREVIOUSLY ACQUIRED INTEREST IN SAME PROPERTY.— Where, prior to October 1, 1866, the plaintiff had acquired an interest in the telegraph line and property in controversy, that interest was not affected by a contract made on that day for a lease of the line, even though that contract be held void. *Id.*
25. SAME — PROPERTY ACQUIRED UNDER AN ILLEGAL CONTRACT.— Even if the contract of October 1, 1866, is held void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract; following *Planters' Bank v. Union Bank*, 16 Wall. 488, and *Brooks v. Martin*, 2 Wall. 70. *Id.*
26. SAME — RIGHTS SO ACQUIRED WILL BE PROTECTED.— It is therefore held, independently of the question of the validity of the said contract, that the plaintiff has, according to the allegations of the amended bill, an interest in the property in dispute which a court of equity will protect, and defendants have not the right to seize it by force and without process. *Id.*
27. SPECIFIC PERFORMANCE — INJUNCTION.— That although a court of equity will not decree the specific performance of a contract requiring continuous duties, involving the exercise of personal labor and cultivated judgment, yet the violation of such a contract may be enjoined. *Id.*
28. PAROL AGREEMENT TO MODIFY WRITTEN CONTRACT.— The question of the validity and effect of the parol agreement, set out in the

amended bill, to annul and abrogate the vicious clause in the written contract of October 1, 1866, is reserved for further argument and future determination. *Id.*

29. CORPORATION — CONTRACT — ULTRA VIRES — INJUNCTION. — Although a contract may have been *ultra vires*, a court of equity will restrain a corporation from recovering possession of property which has passed thereunder without due process of law and a return of the consideration paid. *Atlantic & Pacific Telegraph Company v. Union Pacific Railway Company and another*, 541

COUNTY BONDS.

1. COUNTY BONDS TAX — STATUTORY CONTRACT — REPEAL. — Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds, as the same become due," the power of taxation, thus given, enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted. *United States ex rel. Merchants' National Bank v. Jefferson County*, 356
2. TAX MUST BE LEVIED NOTWITHSTANDING REPEAL. — In such case, it is the duty of the county court to levy, and cause to be collected, a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and if it does not perform this duty, it may be compelled to do so by *mandamus*. *Id.*
3. COUNTY BONDS — COURT HOUSES — INTERNAL IMPROVEMENTS — CONSTRUCTION OF STATUTE. — Where a statute passed in 1856, and ever since continued in force, authorized the county commissioners to build and keep in repair county buildings, and to borrow money under certain conditions for that purpose, and another statute passed in 1869 provided for issuing county bonds to aid in building railroads and other works of internal improvement; *held*, that although court houses are works of internal improvement, yet, inasmuch as their erection had been provided for by the first named act, they were not embraced within the general terms of the latter. *Lewis v. The Board of County Commissioners of Sherman County*, 377
4. POWER TO BORROW MONEY TO BUILD COURT HOUSE — COUNTY BONDS. — Where a statute authorized a county to borrow money to build a court house, the county is not thereby authorized to issue bonds for that purpose, and to put them on the market, without borrowing or realizing money on the same. *Id.*
5. COUNTY BRIDGE BONDS — RECITALS — INNOCENT HOLDERS. — The statute of Nebraska authorizes the issue of bonds to aid in building

bridges, and where such bonds are issued, and contain recitals that they are issued for that purpose conformably to law, they are good in the hands of innocent purchasers. *Id.*

6. COUNTY BONDS — NEW BONDS IN LIEU OF OLD — FAILURE OF COUNTY TO CARRY OUT AGREEMENT — PROPER REMEDY.— Bonds were issued by a county, under an act of the legislature, making it obligatory on the county to levy an annual tax sufficient to pay the interest on the bonds as it accrued, and the principal at maturity. Afterwards, the county proposed to the holders of such bonds that if they would scale them twenty-five per cent., and take new bonds for the reduced sum, the county would annually levy and collect a sufficient tax to pay the interest on the new bonds as it accrued, and the principal at maturity, and that, if it failed to do so, the holders of the new bonds should be restored to all their rights under the old bonds. New bonds were issued under this agreement, but the county failed to pay the interest thereon, and by reason of the terms of the act under which they were issued could not levy a tax for that purpose. *Held*, an action at law could be maintained on the original bonds, and that a bill in equity, not seeking for any discovery, would not lie. *Merchants' National Bank of Little Rock v. The County of Pulaski*, 316

7. SURRENDER OF VALID EVIDENCE OF INDEBTEDNESS FOR ONE THAT IS INVALID — EFFECT.— Where a valid evidence of indebtedness issued by a county is surrendered by the holder to the county, and a new evidence of debt issued therefor, which is invalid, the legal rights of the creditor are not affected thereby. *Id.*

CREDITORS. See *Mortgage*, 2, 17. *Corporation*, 4.

CUSTODY. See *Jurisdiction*, 4.

DAMAGES. See *Patent*, 1. *Warranty*, 4. *Bridges*, 9.

1. DAMAGES — NEGLIGENCE.— In the absence of a statute damages cannot be recovered by a father from a railroad company for causing the death of a minor son. *Sullivan v. The Union Pacific Railroad Company*, 301

DEBTOR. See *Mortgage*, 17.

DEED. See *Title*, 1. *Conveyance*, 1, 2, 3. *Mortgage*, 7.

1. UNRECORDED DEED — POSSESSION — NOTICE.— Complainant purchased certain land from B. and took a conveyance which he neglected to place on record. B. subsequently made a mortgage to respondents upon other lands, and by mistake included in said mortgage the land previously sold to complainant. The respondents claimed the land under the mortgage. *Held*, that they were not *bona fide* purchasers without notice, since the complainant was in the actual open, notorious, adverse possession of the land when

the mortgage was executed. Actual possession is constructive notice to all the world. *Gum v. The Equitable Trust Company and Jonathan Edwards, Trustees*, 51

2. MISTAKE OF FACT — ESTOPPEL. — B., in order to obtain a loan of \$3,000 from respondents, proposed to secure them by deed of trust on his home farm. In his application for the loan and in the appraisal which accompanied the same, the land which complainant had previously purchased from B. was by mistake included with the farm. The complainant was one of the appraisers of the land and signed the written appraisal, supposing it related to the farm only, and ignorant of the fact that his own land was included. *Held*, that he was not estopped. *Id.*
3. SAME. — A mere appraiser of land, serving gratuitously for the benefit of others, without any interest of his own involved, is not to suffer by reason of an innocent mistake respecting the description of the land. Estoppel in such a case can proceed only upon the ground of fraud or gross negligence. *Id.*
4. AGENCY — SALE AGENT. — It is not always necessary that a sale agent should be known to his principal, or in any way recognized by him, in order to bind the latter. Authority is sometimes implied from the very nature of the duties and powers committed to a general agent, to employ sale agents, and, when this is the case, the principal is bound by the acts of the sale agent, whether the sale agent be known to him personally or not. *Id.*

DECREE. See *Patent*, 3. *Mortgage*, 5, 6, 21, 24. *Equity*, 1.

1. DECREE TO QUIET TITLE ONLY BINDS PARTIES AND PRIVIES. — A decree in chancery against F. B. and J. W. B. in a suit wherein J. B. was not a party, quieting title to certain land in the plaintiff, is not good as against F. B., who was in possession, claiming an interest prior to the commencement of such chancery suit, and still remains in possession. *Weed Sewing Machine Co. v. Franklin Baker, James W. Baker and John Baker*, 579
2. EJECTMENT — EFFECT OF DECREE QUIETING TITLE. — This rule applies to a suit in ejectment based upon such decree to recover possession from J. B., who was not a party to it, nor in privity with any party. *Id.*

DEED. See *Conveyance*, 7.

DEFAULT. See *Mortgage*, 11.

DISTRAINT. See *Taxation*.

DISSOLUTION. See *Internal Revenue*.

DIRECTORS. See *Corporation*, 12. *Contract*, 7. *Pacific R. R. Co.*, 6.

DOMAIN. See *Eminent Domain*.

DOUBT. See *Pacific R. R.*, 7.

DRAFT. See *Bills of Exchange*, 3.

DURESS. See *Mortgage*, 9.

EJECTMENT. See *Decree*, 2.

EMINENT DOMAIN.

1. **EMINENT DOMAIN—NORTHERN PACIFIC RAILROAD COMPANY—STATE STATUTE.**—The charter of the Northern Pacific Railroad Company, obtained from the general government, does not exempt its right of way from the operation of the laws of the state of Minnesota, and forbid a railroad company organized under the general law of the state to exercise the right of eminent domain. *Northern Pacific Railroad Co. v. St. Paul, Minneapolis & Manitoba Railway Co. and others*, 302
2. **SAME—REVISED STATUTES OF STATE OF MINNESOTA, CH. 34, §§ 13-23.**—In Minnesota a railway corporation can only take possession of lands under the power of eminent domain, after the compensation for the property to be taken is assessed and paid, or on appeal from the award of commissioners by executing a bond conditioned to pay the award. *Harrington v. St. P. & S. C. R. Co.*, 17 Minn. 215, and *Lohman v. St. P., S. & T. F. R. Co.* 18 Minn. 174, distinguished. *Id.*
3. **EMINENT DOMAIN—RIGHT OF WAY—STATE LEGISLATION.**—The right of way of the Union Pacific Railway is not the property of the federal government set apart for its own public use, so as to exempt it from the operation of a law of the state of Nebraska, respecting the crossing and connecting of railroads, and the condemnation of property for those purposes. *The Union Pacific Railway Co. v. The Burlington & Missouri River Railroad Co. in Nebraska, and the Omaha & Southwestern Railroad Co.*, 452
4. **SAME—FOREIGN RAILWAY CORPORATIONS.**—Sections 97 and 113 of the general statutes of the state of Nebraska, respecting the crossing and connecting of railroads, and the condemnation of property for those purposes, are applicable to foreign as well as domestic railway corporations. *Id.*
5. **SAME—CONCURRENCE OF MAJORITY OF COMMISSIONERS.**—The concurrence of a majority of commissioners in the condemnation of a right of way, in the exercise of the power of eminent domain, is a public matter within the meaning of the rule that, when authority is vested in three or more persons to determine a public question or matter of public concern, a majority have power to decide, provided all act on the matter. *Id.*

EMPLOYEE. See *Railway*, 2.

ESTOPPEL. See *Corporation*, 17. *Deed*, 2, 8. *Warranty*, 3. *Sale*, 3. *Contract*, 8. *Mortgage*, 23.

EQUITABLE RELIEF. See *Contract*, 5, 9.

EQUITABLE. See *Contract*, 2. *Warehouseman*.

EQUITY. See *Sale*, 4. *Mortgage*, 15. *Bank Check*, 2.

1. EQUITY—BILL TO SET ASIDE DECREE—JURISDICTION.—If, in a direct proceeding to set aside the decree of another court, there are parties before the court other than those in the proceeding in which the decree was rendered, and it is charged that such decree was fraudulent, the court may entertain jurisdiction thereof, and prevent the parties before it from proceeding to enforce such decree or availing themselves of any advantages thereunder. *Sahlgard v. Kennedy and others*, 291
2. SAME—SAME—FRAUD.—An original bill is a proper mode of seeking redress against a decree obtained by fraud or covin. *Id.*
3. SAME—SAME—WHEN PROCEEDINGS SHOULD BE IN COURT RENDERING DECREE.—Where the proceedings to obtain relief against a decree are tantamount to common-law practice of moving to set aside a judgment for irregularity, writ of error, or bill for review, they should be in the court where the decree is rendered; but if they are equivalent to a bill in equity to set aside for fraud, they constitute a new and original proceeding. *Id.*
4. SAME—SAME—SUFFICIENCY OF BILL.—A bill in equity by a bond holder to set aside a foreclosure decree and sale thereunder containing allegations tending to show that one of the trustees under the mortgage combined with the purchasers at the sale to bid in the mortgaged property at a sacrifice of the interests of the bond holders, and that the trustee permitted the control of the foreclosure proceedings to pass into the hands of such purchasers, states equities sufficient to require an answer. *Id.*
5. EQUITY—STIPULATION TO SUBMIT CAUSE UPON AGREED STATEMENT OF FACTS WITHOUT PLEADING.—This court will not take cognizance of a case in equity in which parties agree upon a statement of facts and stipulate that the court shall take jurisdiction, try the cause and render decree without pleadings. *Nickerson et al. v. The Atchison, Topeka & Santa Fe Railroad Company et al.*, 383
6. STATUTE OF STATE NO APPLICATION TO A FEDERAL COURT OF EQUITY.—The statute of Kansas authorizing such a proceeding in the courts of that state, confers no jurisdiction upon this court sitting as a federal court of equity, nor does it change the chancery practice in this court in any respect. *Id.*

7. **EQUITY — STATE AND FEDERAL COURTS.**— In the determination of a question of equity law, the federal and state courts appeal to the same sources of information on equity jurisprudence, and the decisions of either are not binding on the other. *Butler and others, Trustees, v. Douglass and others,* 680
8. **SAME — VENDOR'S LIEN — FORECLOSURE — STATUTORY BAR.**— In Arkansas there is no statutory bar to a suit in equity to foreclose a vendor's lien for the purchase money of real estate, where the vendor has not parted with the legal title. *Id.*
9. **SAME — SAME — SAME — REASONABLE TIME.**— In such case the lien must be enforced within a reasonable time, and the federal courts hold that that reasonable time is not less than twenty years. *Id.*
10. **SAME — LEGAL TITLE — BONA FIDE PURCHASE — NOTICE.**— The protection extended by a court of equity to a *bona fide* purchaser belongs only to the purchaser of a legal title without notice of an outstanding equity. He who purchases no legal title is not protected, even though without actual notice. *Id.*

EVIDENCE. See *Patent*, 1. *Contract*, 4. *Practice*, 7, 8. *Title*, 1. *Common Carrier*, 2. *Partnership*, 2, 5.

1. **EVIDENCE — RECORD OF FORMER SUIT — IDENTITY OF CONTROVERSY.**— Where the question in controversy relates to the identity of certain land, record evidence is admissible to show that the same controversy has been litigated between the defendant and the plaintiff's grantor, and determined by the state court. *Jones v. Miller,* 535
2. **SAME — GRANTOR AND GRANTEE — ADVERSE POSSESSION.**— The adverse holding of a grantor who has given a warranty deed, must be established by clear and undoubted testimony, showing a change in the relations of the parties towards the land. *Id.*

EXCHANGE. See *Bill of Exchange*.

EXECUTION. See *Jurisdiction*, 4. *Sale*, 7, 9.

EXPERT TESTIMONY. See *Contract*, 4.

FALLS OF ST. ANTHONY. See *Mississippi River*, 2.

FALSE PRETENSES. See *Sale*, 1.

FIRE INSURANCE. See *Insurance*.

FORECLOSURE. See *Equity*, 8. *Mortgage*, 24. *Forgery*, 8. *Corporation*, 8. *Railway*, 2.

1. **FORECLOSURE BY ADVERTISEMENT — NOTICE OF SALE — CLAIM FOR ATTORNEY'S FEES.**— The insertion of a claim for \$50, for attorney's fees, in the published notice of a foreclosure sale, under

a statute of the state of Minnesota, where the mortgage only stipulated for the payment of \$25 for attorney's fees, in the event of such foreclosure, will not invalidate a sale made in accordance with such notice, in the absence of fraud and prejudice to the mortgagor or owner of the equity of redemption. *Swenson v. Halberg and another*, 96

2. **SAME — SALE OF SEVERAL TRACTS IN ONE PARCEL.**—The sale of several tracts in one parcel, contrary to the provisions of such statute, will not be disturbed, in the absence of fraud and prejudice to the mortgagor or owner of the equity of redemption. *Id.*
3. **HOMESTEAD — SALE UNDER FORECLOSURE — REDEMPTION BY ASSIGNEE IN BANKRUPTCY.**—The redemption of a homestead from foreclosure sale by an assignee in bankruptcy does not enure to the benefit of the bankrupt and his assigns. *Id.*

FORFEITURE. See *Railroad*, 6. *Insurance*, 5, 6, 7.

FORGERY.

1. **FORGERY — ACCOMMODATION NOTE — INNOCENT INDORSEE.**—The accommodation note of an individual partner, secured by a mortgage upon the wife's separate property, and made for the benefit of the firm, is utterly void in the hands of an innocent indorsee, as against the wife of the maker, where the name of the wife was forged, prior to indorsement, as the joint maker of such note, by the payee and managing partner of the firm. *Mersman v. Werges and another*, 528
2. **SAME — SAME — MORTGAGE.**—The mortgage given to secure the note, although duly executed by the husband and wife, is rendered void by such forgery. *Id.*
3. **JURISDICTION — FORECLOSURE — ASSIGNOR AND ASSIGNEE.**—In such case a federal court could not assume jurisdiction of a suit by the assignee upon the mortgage alone, when the assignor and the mortgagor are both citizens of the same state. *Sheldon v. Sell*, 8 How. 441, followed. *Id.*

FRANCHISES. See *Pleading*, 11, 12. *Corporation*, 23.

FRAUD. See *Insurance Co.*, 9. *Conveyance*, 4, 5, 6. *Contract*, 6. *Bankruptcy*, 3. *Partnership*, 4. *Warehouseman*. *Equity*, 2. *Bonds*, 6. *Contract*, 5. *Assignment*, 2, 3.

- * **FRAUDULENT CLAIMS AGAINST THE UNITED STATES — ACT OF MARCH 2, 1863, CONSTRUED.**—The act of March 2, 1863 (13 Statutes at Large, page 693, sections 1-3), for the punishment of frauds upon the government by conspiring to obtain the payment or allowance of false claims against it, and by making false affidavits, etc., in support of such claims, construed and applied. *United States v. Charles R. Jennison*, 226

FRAUDULENT CONVEYANCES. See *Lien*, 1.

FRAUDULENT POSSESSION. See *Practice*, 8.

FRAUDULENT SALE. See *Practice*, 8.

GARNISHMENT. See *Railway*, 1.

GENERAL DENIAL. See *Pleading*, 7.

GRANTEE. See *Evidence*, 2.

GRANTOR. See *Evidence*, 2.

HIGHWAY. See *Private Way*, 1.

HOMESTEAD. See *Foreclosure*, 3.

1. **HOMESTEAD—MARRIED WOMAN—CONTRACT FOR MORTGAGE BEFORE MARRIAGE.**—A contract for the loan of money upon mortgage security will not defeat the wife's right of homestead, under the statute of Iowa, upon the subsequent marriage of the mortgagor before the execution of the mortgage. *Tolman v. Leathers*, 829

HOME PORT. See *Admiralty*, 1.

HUSBAND. See *Bonds*, 3.

1. **HUSBAND AND WIFE—MARRIED WOMAN'S SEPARATE PROPERTY—CONVEYANCE BY HUSBAND.**—A wife owned and resided with her husband upon lands which were her separate property and estate under the statute. Her husband conveyed these lands to a trustee to secure the payment of a debt. The trustee sold the lands in pursuance of the power contained in the deed of trust, and made a deed to the purchaser, after which the husband acknowledged himself to be a tenant of the purchaser, to whom he agreed to pay rent for the lands. In an action brought by the purchaser against the husband for the possession of the land, *held*, that the wife should be admitted a defendant, and that upon these facts the plaintiffs could not recover. *Chaffe & Bro. v. Oliver*, 626

INCAPACITY. See *Contract*, 4. *Indian Treaty*.

1. **INDIAN TREATY—CONSTRUCTION OF GRANT MADE THEREBY.**—Grants and reservations claimed under Indian treaties are strictly construed against the grantee or beneficiary. *Goodfellow v. Joseph Muckey, Mary Muckey and L. H. Ogee*, 238
2. **INDIAN TITLE POSSESSORY IN GENERAL.**—It has been uniformly held by the supreme court of the United States that (in the absence of express legislation by congress to the contrary) the Indian title is but a right of occupancy, the fee remaining in the United States. *Id.*
3. **POTTAWATOMIE TREATY, NOT A GRANT IN PRESENTI.**—The treaty between the United States and the Pottawatomie tribe of

Indians, of November 15, 1861 (12 U. S. Stat. § 1192), is not an exception to this general rule, and does not amount to a grant *in presentis*. *Id.*

INDICTMENT. See *Practice*, 7.

INDORSER. See *Forgery*, 1, 2, 3.

INDORSEMENT. See *Bills of Exchange*, 4.

INCAPACITY. See *Contract*, 4.

INFAMY. See *Practice*, 9, 11.

INFRINGEMENT. See *Patent*, 1.

INJUNCTION. See *Corporation*, 4, 21, 27, 29. *Contract*, 12, 14. *Mississippi River*, 3. *Pacific R. R.*, 4.

1. INJUNCTION — POWER OF CIRCUIT JUDGE. — The judges of the circuit courts have power to grant writs of injunction only in cases where they might be granted by the circuit court. *Murray et al. v. Henry Overstols et al.*, 606
2. SAME — INJUNCTION TO RESTRAIN THE VIOLATION OF A SUPERSEDEAS. — Neither a circuit judge nor the circuit court has jurisdiction to interpose by injunction to prevent the execution of the judgment of a state court upon the ground that it has been superseded by a writ of error from the supreme court of the United States, or to enjoin state officials or others from disregarding such supersedeas. (Only the supreme court or a justice thereof can grant an injunction for this purpose. *Id.*

INJURIES. See *Mississippi River*, 1, 3.

INSURANCE. See *Pleading*, 3. *Service*, 4. *Usury*, 2, 3.

1. LIFE INSURANCE — WARRANTY — AVERMENT OF APPLICATION THAT HE IS A SINGLE MAN. — The averment of a married man, in an application for life insurance, that he is a single man, amounts to an absolute warranty. *Jeffries, Adm'r, v. Union Mut. Life Ins. Co.*, 114
2. ATTORNEY-AT-LAW — COMPROMISE OF SUIT — EXPRESS AUTHORITY — SATISFACTION OF JUDGMENT. — The entry of the satisfaction of judgment, on the record of the court will not be set aside, where such satisfaction was entered pending a writ of error to the supreme court in behalf of the defendant, upon part payment of the judgment, under a compromise with the duly authorized attorneys of the plaintiff, although such entry of satisfaction was not made in open court, and the original plaintiff had died pending such compromise, and the authority of the attorneys had not been ratified by the administrator *de bonis non*. *Id.*

8. MARINE INSURANCE — GOVERNMENT VESSEL — UNLICENSED PILOT — SEAWORTHINESS.— The mere fact that the officers navigating a government vessel are not licensed pilots, does not *prima facie* render a vessel unseaworthy under the warranties of marine insurance. *Hathaway and others v. St. Paul Fire & Marine Ins. Co.*, 25
4. INSURANCE, FIRE — CONDITIONS IN POLICY CONSTRUED — PLEADING.— Where a policy of insurance provides for an arbitration to determine the amount of loss in case differences arise touching the same, "and upon the written request of either party," and also that no suit shall be sustainable until after an award shall have been obtained in the manner above provided, *held*, that the defense that plaintiff has refused to arbitrate cannot be made where neither party has made a written request for such arbitration; and *held*, further, it makes no difference that one or the other party has refused to arbitrate upon a verbal request to do so, or may have refused to make such request in writing. *Wallace v. German-American Insurance Company*, 335
5. LIFE INSURANCE — FORFEITURE — NEW AGENT.— A life insurance policy, containing a provision that the same should "cease and determine" if the premium should not be paid when due, is not forfeited by the failure to pay such premium on the day it is due, where the company neglected to inform the assured of a change in the agent authorized to receive the same after they had adopted a rule to give such notice in all cases, and the assured tendered the premium in due season to the former agent of the company, and was unable to find the new agent after reasonable inquiry. *Seamans v. The Northwestern Mutual Life Insurance Co.*, 510
6. SAME — SAME — REASONABLE TIME.— In such case the assured was entitled to a reasonable time before a forfeiture could be declared. *Id.*
7. SAME — SAME — SAME.— The failure to pay such premium for sixty days after it was due was not, under such circumstances, an unreasonable time, where the company had waived the time of payment in the previous year, and it did not appear at what time, if ever, the assured was informed of the place of payment. *Id.*
8. POWERS OF INSURANCE COMPANIES — NEGOTIABLE PAPER.— Insurance companies have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them. *Alexander v. Horner*, 684
9. PROMISSORY NOTE — PAYMENT — FRAUD.— The maker of a note, who pays it to an indorsee and holder who obtained it by fraud, is discharged from liability thereon to the payee, unless the maker

had notice of such fraud; and the discharge extends as well to the original consideration. *Id.*

10. **PARTIES.**— Where, in such a case, the payee files a bill in equity to avoid the assignment and compel the maker to pay the note a second time, upon the ground that he had notice of the fraud, the alleged fraudulent indorsee to whom the payment was made is an indispensable party. *Id.*
11. **PRACTICE — NON-JOINDER OF PARTIES.**— The objection of the non-joinder of necessary parties is not required to be raised by the pleadings; it may be made on the hearing, and it may, and in a clear case, ought to be raised and acted upon by the court on its own motion. *Id.*

INTERLINEATION. See *Mortgage*, 19.

INTERNAL REVENUE.

1. **TAXES, LIEN FOR, WHEN IT ATTACHES, AND TO WHAT PROPERTY.**— Under the provisions of section 8186 of the Revised Statutes of the United States, the lien of the United States for delinquent taxes attaches only to property of the delinquent tax payer, owned by him at the time when payment of such taxes is demanded. *The United States v. The Pacific Railroad et al.*, 1
2. **STATUTES CREATING LIENS, INNOCENT PURCHASERS.**— Statutes creating liens upon property should be construed favorably to innocent purchasers of such property. *Id.*
3. **INTERNAL REVENUE ACT OF 1864 — LIEN, HOW ESTABLISHED.**— Under the internal revenue act of 1864 and 1866, it is necessary, in order to establish and enforce a lien for taxes, that all the prerequisites of those laws shall be strictly complied with. *Id.*
4. **SAME NECESSITY FOR ASSESSMENT, etc.**— Under said internal revenue laws, it is necessary that an assessment return or list of the taxes delinquent should be had, before, and in addition to, the demand, which is the foundation of the lien. *Id.*
5. **INTERNAL REVENUE TAX ON BANK DIVIDENDS — ACT OF CONGRESS CONSTRUED.**— Under the legislation of congress (16 Stat. at Large, 280), national banks are liable to a penalty for failing to make a return of dividends declared, etc., during the period between July 1 and December 30, 1870. *The United States v. State National Bank of Minneapolis*, 183
6. **SAME.**— Said dividends, etc. are subject to a tax of two and one-half per centum during said period. *Id.*
7. **INTERNAL REVENUE — POSSESSION OF PARTS OF STAMPS PREVIOUSLY USED ON SNUFF JARS — REV. ST. § 3376.**— The possession of parts of internal revenue stamps which had been previously used upon snuff jars does not constitute an offense within the terms of

section 3376 of the Revised Statutes, relating to the fraudulent possession of cancelled stamps, although the facts indicated a fraudulent purpose upon the part of the defendant. *United States v. Loup*, 168

8. INTERNAL REVENUE — LICENSE — RIGHT OF ONE PARTNER UNDER LICENSE TO FIRM AFTER DISSOLUTION. — Where license for carrying on business as brewers was issued to the firm of A. & G. for one year, and before the year expired G. purchased A.'s interest in the business, and continued the business at the same place till the end of the year, and not elsewhere by either partner, — *held*, no violation of the law. *The United States v. Adam Glab*, 166

JUDGMENTS. See *Practice*, 10. *Jurisdiction*, 4. *Sale*, 5, 6, 8. *Non-suit*, 1. *Officers*, 1, 2.

JURISDICTION. See *Admiralty*, 1. *National Banks*, 1. *Forgery*, 3. *Bankruptcy*, 7.

JURISDICTION. See *Corporation*, 18.

JURISDICTION. See *Pleading*, 1.

JURISDICTION. See *Mandamus*. *Lien*, 4. *Equity*, 1.

1. EQUITABLE JURISDICTION OF FEDERAL COURTS — STATUTE OF LIMITATIONS. — A federal court will assume equitable jurisdiction of a suit by a receiver of a bank against the estate of a decedent for the recovery of a debt alleged to have been fraudulently concealed, although the claim is barred by the statute of limitations of the state in which such court has territorial jurisdiction. *Johnson, Receiver, etc., v. Roe and others*, 162
2. JURISDICTION — ACTION AGAINST COUNTY — REV. ST. OF MISSOURI, § 5359. — Section 5359 of the Revised Statutes of the state of Missouri, which provides that "all actions whatever against any county shall be commenced in the circuit court of such county," etc., does not deprive the federal courts of jurisdiction in an action against a county of such state, brought by a citizen of another state. *Ounningham v. County of Ralls*, 117
3. JURISDICTION — CONCURRENT JURISDICTION OF THE CIRCUIT AND PROBATE COURTS — PAYNE V. HOOK, 7 WALL, 426, FOLLOWED. — In a suit against the administrator of an executor, by the citizens of another state, to enforce the payment of a judgment obtained against the decedent in such state, during his life time, and subsequently sued upon in the circuit court for the district of Minnesota, and judgment obtained thereon against the executor of the decedent, such circuit court has concurrent jurisdiction with the probate court of the state of Minnesota in which the wills of the

decendent and the deceased executor have both been probated
Chapman, Executor, etc., v. Borer, Administrator, etc., and others, 49

4. JURISDICTION—EXECUTION—JUDGMENT IN FEDERAL COURT—PROPERTY IN CUSTODY OF STATE COURT.—Where, under the "Insurance Act" of the State of Missouri, proceedings have been instituted in the state court against an insurance company, which finally result in the dissolution and administration of the affairs of that company, all intermediate proceedings must be finally disposed of in that tribunal, even though a valid and subsisting judgment was obtained in the federal court against the company pending such administration. *Levi v. Columbia Life Ins. Co., 34*
5. JURISDICTION—MASTER IN CHANCERY.—Consent will not authorize a master in chancery to act as a referee at law. *The Farmers' Loan & Trust Company v. Central Railroad of Iowa and others, 333*
6. JURISDICTION—NATIONAL BANKS.—The federal courts have jurisdiction over all suits by and against national banks, irrespective of the subject matter. *Foss and others v. The First National Bank of Denver, 474*
7. SAME—SAME—PARTIES.—Joining merely nominal or personal parties has no effect either to confer or exclude the jurisdiction; but trustees, executors and the like, are not formal parties within the meaning of the rule, where in fact interested in the litigation. Accordingly, where two or three persons, claiming a certain fund which was in the custody of a national bank, brought their bill in equity against the bank and a third claimant, and the bank exhibited its cross bill, praying that the parties might interplead, this was held to confer jurisdiction, although but for such cross bill the jurisdiction was doubted. *Id.*
8. JURISDICTION—SUBPŒNAS—SERVICE.—A suit to set aside a decree of foreclosure and a sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpoenas upon persons without the territorial jurisdiction of the court. *Pacific Railroad v. Missouri Pacific Railway Company and others, 647*
9. SAME—SAME—SAME—SOLICITORS.—The service of subpoenas on solicitors and attorneys of persons before the court in the former suit is of no validity until an application to the court has first been made, setting forth the circumstances which render such service proper, and an order obtained from the court directing that service be made, and that such service, when made, should answer as a substitute for actual service on the parties so represented by the attorneys or solicitors. *Id.*
10. LAND PATENTS—SUITS BY GOVERNMENT TO SET ASIDE.—Where patents for lands have been issued without authority of law, the

United States may, in their own name, maintain a bill in equity, in the circuit court, to annul and set aside the patents. *The United States v. The Leavenworth, Lawrence & Galveston Railroad Company*, 610

11. OSAGE LANDS—CANCELLATION OF PATENTS AT SUIT OF GOVERNMENT. — On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stats. at Large, 240), and the subsequent treaty with the same Indians, proclaimed January 21, 1867 (14 Stats. at Large, 687), and of the act of congress of March 3, 1863 (12 Stats. at Large, 772), granting lands to the state of Kansas to aid in the building of railroads: *Held*, that land which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy, did not pass under the said railroad grant, and that the United States were entitled to have cancelled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant. *Id.*

12. LAND GRANT TO AID RAILWAYS—INDIAN RESERVATION—TREATY WITH OSAGE INDIANS CONSTRUED. — For reasons similar to those in the case of *The United States v. The Leavenworth, Lawrence & Galveston Railroad Company*, *supra*, the lands reserved for the benefit of the Osage Indians did not pass, under the land grant of congress, to the state, to and in the building of railways, approved July 26, 1866. *The United States of America v. The Missouri, Kansas & Texas Railway Company*, 624

LEASE.

1. LEASE—PART PERFORMANCE. — A lease which has not been reduced to writing, but has been acted upon and partly performed, will be considered as binding as if signed. *Farmers' Loan and Trust Company v. The St. Joseph & Denver City Railroad Company and others*, 247
2. SAME—ULTRA VIRES—RATIFICATION BY STOCKHOLDERS. — Under section 152, p. 204, statutes of Nebraska, a railroad company in that state cannot make a valid lease of its property and franchises for the term of its charter, without the same being ratified by its stockholders; but when the same have been used for a time under such void agreement, the company, or those representing it, may recover a just compensation for the use of such property during the time it is so used. *Id.*

LEDGE OR LODGE. See *Mining Law*, 1.

LEGAL TITLE. See *Equity*, 10.

LICENSE. See *Internal Revenue*.

LIEN. See *Mortgage*, 12. *Internal Revenue*, 1. *Admiralty*, 4. *Lien Holders*.

1. **EQUITABLE LIEN — FRAUDULENT CONVEYANCE BY JUDGMENT DEBTOR — BILL FILED BY JUDGMENT CREDITOR.**— Judgment, execution and a return of *nulla bona* place the judgment creditor in a position to assail conveyances made by the judgment debtor to defraud his creditors, and the filing of a bill for that purpose, and the service of process in the action, create a lien in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors. *Kimberling v. Hartly and another*, 126
2. **SAME — BANKRUPTCY.**— The lien thus created is not displaced by the subsequent bankruptcy of the judgment debtor, but is protected by the bankrupt act. *Id.*
3. **ASSIGNEE IN BANKRUPTCY — SELECTION OF BANKRUPT'S PROPERTY.**— Assignees in bankruptcy are not bound to take all the property of the bankrupt, but may reject such as may be rather a burden than a benefit to the estate. *Id.*
4. **BANKRUPTCY — JURISDICTION OF STATE COURT IN SUIT PENDING.**— Where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause and execute the same. The assignee in bankruptcy may intervene in such action, but the jurisdiction of the state court and the validity of its decree is not affected by his failure to do so. *Id.*
5. **ASSIGNEE IN BANKRUPTCY — ASSIGNMENT PENDENTE LITE — SUBSEQUENT PROCEEDINGS.**— The rule that one who purchases *pendente lite* is bound by the subsequent proceedings, is applicable to an assignee in bankruptcy, and to the transfer made by a bankruptcy proceeding. *Id.*

LODE OR LEDGE. See *Mining Law*, 1.

LOGS. See *Mississippi River*, 1.

MANDAMUS. See *Officers*, 2.

1. **MANDAMUS — JURISDICTION OF THE CIRCUIT COURTS.**— The jurisdiction of the circuit courts in *mandamus* proceedings is not enlarged by the act of 1875. *American Union Telegraph Co. v. Bell Telephone Co.*, 175

MARRIED WOMEN. See *Homestead*, 1. *Husband and Wife*, 1.

MASTER IN CHANCERY. See *Jurisdiction*, 5.

MASTER AND SERVANT.

1. **MASTER AND SERVANT — NEGLIGENCE.**— A master is liable for negligence in the use of defective machinery, whereby his servant was injured, although the negligence of a fellow servant contributed to the injury. *McMahon v. Henning, Receiver*, 516
- SAME — RECEIVER — COMPILED LAWS OF KANSAS (1879), CH. 84, § 29.**— *Quare*, whether a receiver, engaged in the operation of a railroad, is a "railroad company" within the meaning of section 29, ch. 84 of the Compiled Laws of Kansas (1879), which provides that "every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of the engineer or other employe, to any person sustaining such damage." *Id.*

MENTAL CONDITION. See *Contract*, 1.

MINING LAW.

1. **MINING LAW — LODGE OR LEDGE DEFINED.**— A vein, lode or ledge, within the meaning of the act of congress, is a mineral body of rock within defined boundaries in the general mass of the mountains. *Stevens v. Williams et al.*, 490
2. **SAME — TOP OR APEX.**— The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein, at its highest point, turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex. *Id.*
3. **SAME — FOLLOWING VEIN.**— Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein in its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at any point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal. *Id.*

MINOR.

PLEA OF MINORITY A PERSONAL DEFENSE.— In a suit to foreclose a mortgage given to secure a promissory note, the maker of the note may set up by way of defense the fact that he was a minor when he executed the same, but a subsequent lien holder cannot join in this defense. Only the minor himself can plead it. *Baldwin v. Benjamin S. Rosier et al.*, 384

MISAPPROPRIATION. See *Bankruptcy*, 1.

MISSISSIPPI RIVER.

1. **MISSISSIPPI RIVER — LOGS — INJURIES.**—The use of the Mississippi river as a highway to run logs down to market is a right common to all, but there is no immunity to individuals for injuries committed while using such right. *United States v. The Mississippi & Rum River Boom Company and others*, 601
2. **SAME — FALLS OF ST. ANTHONY — PUBLIC IMPROVEMENTS.**—An act authorizing the construction of an apron of planked timber over the crest of the falls of St. Anthony, in the Mississippi river, under the direction of the secretary of war, to protect the rock and prevent the washing away of the underlying soft sandstone, is within the constitutional jurisdiction of congress. *Id.*
3. **NAVIGABLE RIVER — PUBLIC IMPROVEMENTS — INJURIES — INJUNCTION.**—Where a right common to all is abused, or so used as to cause damage, the injured party must seek redress by an action at law; but where congress has assumed jurisdiction of a river in the interest of commerce, the equitable arm of the court can furnish relief against any threatened injury to any improvements made under its authority. *Id.*

MORTGAGE.—See *Railway. Homestead*, 1. *Forgery*, 2, 3.

1. **MORTGAGE — SPECIFIC LIEN — EQUITABLE TITLE OF GRANTOR.**—A mortgage, or deed of trust in the nature of a mortgage, creates a specific lien, and is, in effect, a security for a debt, and not an absolute conveyance of the property. The equitable title remains in the grantor, and may be sold or incumbered by him, or seized and sold by his creditors, subject to the prior lien of the mortgage or deed of trust. *Bartlett, Reid & Co. v. Teah and others*, 176
2. **ASSIGNMENT FOR BENEFIT OF CREDITORS — ABSOLUTE TITLE PASSED.**—A voluntary assignment of property by a debtor, for the benefit of his creditors, does not operate by way of security for the debts, nor create a lien on the property, but passes the absolute title, legal and equitable, to the assignee, for the purpose of raising a fund to pay debts; and, as against the assignee and those holding under him, the debtor has no estate or interest in the property, legal or equitable, which he can convey or incumber, or which his creditors can seize, or sell, or establish a lien upon, until the purposes of the trust are satisfied. *Id.*
3. **ASSIGNEE — ATTACHING CREDITORS — REV. ST. OF ARK. § 335.**—Under section 385 of the Revised Statutes of Arkansas, an assignee does not acquire title to the property assigned, as against attaching creditors of the assignor, until he files the inventory and gives the bond required by that section; and, until the inventory is filed and the bond given, the assignee cannot lawfully take possession of the property. *Id.*

4. DEED OF ASSIGNMENT IN CONTRAVENTION OF REV. ST. OF ARK. § 387.—A deed of assignment that directs the assignees to sell the property (a stock of goods) in the ordinary course of trade, at private sale, for twelve months, and that, in terms or by necessary implication, forbids a sale at public auction until after the expiration of that period, is in contravention of section 387 of the Revised Statutes, and renders the deed void. *Id.*
5. MORTGAGE — MISTAKE IN DESCRIPTION — CORRECTION BY DECREE.—A court of equity will correct a mistake in a conveyance, and make the instrument conform to the intention of the parties, when that is made to appear, but such reformation will not be allowed to prejudice the rights of *bona fide* and innocent purchasers. *Reeves v. Thos. Vinacks and others*, 218
6. SAME — NOTICE.—Where V. purchased a tract of land upon which his grantor had given a mortgage by a fatally defective description, and assumed to pay the mortgage, stipulating that the premises he purchased were the same on which the mortgage rested, *hadd*, that he was estopped to claim as an innocent purchaser. *Id.*
7. SAME — SAME — RECITALS IN TITLE DEEDS.—A purchaser of land is bound to take notice of the recitals in the deeds of conveyance through which he derives title. *Id.*
8. STATUTE OF LIMITATIONS.—An action to reform and foreclose a mortgage may be brought within ten years, under that clause of the statute of Minnesota which declares that "every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues." *Id.*
9. MORTGAGE — DURESS — ASSIGNEE WITHOUT NOTICE.—Duress is not available, as a defense upon the foreclosure of a mortgage, where the note and mortgage were purchased before maturity for value and without notice. *Beals v. Neddo*, 206
- 9½. NEGOTIABLE PAPER — MORTGAGE — RIGHTS OF ASSIGNEE.—A *bona fide* assignee of a negotiable promissory note who takes the same together with a mortgage securing it before maturity, takes the mortgage as well as the note free of equities.
10. CHATTEL MORTGAGE — LOGS — SUFFICIENT DESCRIPTION.—A chattel mortgage of certain logs described them as being the northerly or rear 1,250,000 feet lying in a certain creek, and marked with a certain mark, to be ascertained by commencing at the rear or northerly end of said logs, and counting along said stream southerly until the requisite number was so counted and set apart. *Held*, sufficiently definite. *The Merchants' National Bank of St. Paul v. McLaughlin, Sheriff, etc.*, 258
11. SAME — DEFAULT — RIGHT OF POSSESSION.—After default in the conditions of a chattel mortgage, the absolute right of possession is in the mortgagee. *Id.*

12. **LIEN HOLDERS — RIGHTS OF.**— Where there are two funds, to both of which a prior lien holder may resort, while a junior lien holder can resort to but one, the former must first enforce his claim out of the fund to which the latter cannot have recourse. *Id.*
13. **CONFUSION OF GOODS — INNOCENT MORTGAGEE.**— An innocent mortgagee will not be compelled to suffer by reason of the wrongful confusion of the goods by the mortgagor. *Id.*
14. **MORTGAGE — CREDITORS MAY COMBINE TO PURCHASE PROPERTY.**— The creditors of a mortgagor may fairly combine to purchase the property of the debtor at mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale. *Kropholler v. The St. Paul, Minneapolis & Manitoba Railway Co. and others,* 299
15. **BILL TO VACATE DECREE AND SALE — WANT OF EQUITY.**— Bill in equity in this case not showing the complainant clearly entitled to all the relief claimed, and as he may, on proper petition and showing, be admitted as a party to the original suit, the bill in which he seeks to attack the decree and sale is dismissed. *Id.*
16. **MORTGAGE — FUTURE ADVANCES.**— A mortgage given to secure future advances, at a time when no indebtedness existed, is valid. *Schuelenburg & Boeckler v. Martin and others,* 349
17. **DEBTOR AND CREDITOR — APPLICATION OF MONEY.**— Where money has been received in part payment of a running account, and no specific application has been made of the same, a chancellor can, in his discretion, apply such money to that portion of the account which remains unsecured, without regard to the order of time in which the indebtedness for the several items of account was incurred. *Id.*
18. **MORTGAGE — DECEDENT'S ESTATE — PROOF OF DEBT.**— Proof of a debt against the estate of a deceased mortgagor, and receipt of a dividend from the assets of the same, does not extinguish a mortgage given to secure a part of such debt. *Id.*
19. **MORTGAGE — INTERLINEATION — BURDEN OF PROOF.**— "If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, — in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention

- of the parties, the law will presume that it was made in good faith, and before execution." *Oca, Trustees, v. Palmer and others*, 481
20. MORTGAGOR AND MORTGAGEE—WASTE—STATUTE—CONTRACT.—A statutory provision that a mortgagor may continue to use the mortgaged premises during the period allowed for redemption in the same manner as they have been previously used, may be waived by the contract. *Edwards, Trustees, v. Woodbury and others*, 429
21. DEFECTIVE MORTGAGE—DECREE TO REFORM.—Where by mistake the name of the mortgagee, in a mortgage, was omitted, *held*, that decree should be rendered to reform the instrument by inserting the same. *Parlin et al. v. John L. Stone et al.*, 443
22. ESTOPPEL.—If the owner of a tract of land represents to a creditor that the land belongs to another, and induces such creditor to take a mortgage executed by the person so represented as owner, and to extend the time for paying a debt, the owner of the land is estopped to claim it as against the lien of the mortgage. *Id.*
23. COLLATERAL NOTES—ACCOUNTING.—If a mortgagee has received notes as collateral for the mortgage debt, and has collected the same, an accounting to ascertain the sum due should precede decree of foreclosure. *Id.*
24. MORTGAGE—FORECLOSURE—IMPEACHING DECREE.—After confirmation of the sale of a railroad under decree of foreclosure, holders of the mortgage bonds will not be allowed, at a subsequent term, to be made parties to the original foreclosure suit, for the purpose of impeaching the decree, sale, and confirmation as fraudulent, although in the order of confirmation the power to make further order is expressly reserved. The proceedings and sale in this case considered, and *held* free from fraud. *Wetmore and others v. St. Paul & Pacific R. R. Co.*, 486
- MORTGAGEE. See *Mortgage*, 18, 20.
- MORTGAGOR. 20.
- MOTION. See *Nonsuit*, 2.
- MOTION TO DISSOLVE. See *Pacific R. R.*, 4.
- NATIONAL BANKS. See *Taxation, Jurisdiction*, 5.
1. NATIONAL BANKS—JURISDICTION.—National banks are not authorized to institute suits in the federal courts out of the districts where they are established, when the amount in controversy does not exceed \$500. *The St. Louis National Bank v. Brinkham*, 9
- NAVIGATION.
1. PUBLIC STRUCTURES—PROTECTION OF NAVIGATION.—The federal court will protect and secure by injunction the safety of such public structures as are made to improve the navigation of rivers and to facilitate commerce. *The United States v. The Rum River and Mississippi Boom Company et al.*, 897

2. CONTROL OF NAVIGABLE RIVERS FOR PURPOSE OF IMPROVEMENT.—Improvement of the navigable rivers, when undertaken by the general government, is exclusively under its control; and when the execution of the work is entrusted to the war department, the engineer in charge, subject to the approval of the secretary of war, prosecutes the work in such manner as in his judgment he deems best. *Id.*
3. TEMPORARY SUSPENSION OF NAVIGATION MAY BE ORDERED.—Temporary suspension of navigation, when rendered necessary by the mode of improving rivers, is justifiable and lawful. *Id.*
4. BOOM COMPANY ORGANIZED UNDER STATE LAW HAS NO RIGHT TO INTERFERE.—A boom company authorized by its charter granted by the state legislature to collect and assort logs and turn them out of its boom at the request of their owners, and a committee, has by such charter no rights superior to congress when exercising a power conferred by the constitution, and must refrain from performing any act which endangers the successful prosecution of such work. *Id.*

NAVIGABLE RIVER. See *Mississippi River*, 3.

NEGLIGENCE. See *Damages*, 1. *Master and Servant*, 1, 2.

NEGLIGENCE — WHEN A QUESTION OF LAW AND WHEN ONE OF FACT.—Where the facts are undisputed, the court may determine the question of negligence as a question of law, unless it appears that the facts are such that different minds might honestly draw different conclusions therefrom, in which case the question of negligence is for the jury. *O'Neill v. The Chicago & Northwestern Railway Company*. 508

NEGOTIABILITY. See *Bonds*, 5.

NEGOTIABLE PAPER. See *Insurance Companies*, 8. *Mortgage*, 9½.

NEW TRIAL. See *Practice*, 5.

NONJOINDER OF PARTIES. See *Insurance Company*, 11.

NONSUIT.

1. NONSUIT — JUDGMENT.—An involuntary nonsuit does not constitute a judgment on the merits.
2. MOTION FOR JUDGMENT ON PLEADINGS.—Where a jury was impaneled and sworn and the proof submitted, after which, upon motion of defendant's counsel, the court dismissed the case for the reason that plaintiff had not made out a case, *held*, that the record did not show a final adjudication of the matters in issue. *Hammages v. Schuermier and others*, 436

NOTES. See *Mortgage*, 23. *Forgery*, 1, 2, 3. *Insurance Company*, 9.

NOTICE. See *Deed*, 1. *Mortgage*, 6, 7. *Bonds*, 1, 2, 3, 4. *Railroad*, 5. *Equity*, 10.

OBLIGATION. See *Pacific R. R.*, 1.

OFFICERS

1. **OFFICERS OF COURT — POWER OF COURT OVER.**— All courts possess an inherent power of control over all their officials, including attorneys, and these officers are liable to be attached for contempt and punished, by fine or imprisonment, for misconduct, and all except the marshal are liable to be removed from office by the court, for sufficient reason and on proper showing. *Ex Parte C. C. Cole*, 405
2. **ATTORNEYS AT LAW — SUSPENSION — DISBARMENT.**— An attorney may be suspended or disbarred for any matter or thing, whether sufficient to constitute a criminal offense, or create a civil liability or not, if it shows that he is unfit to be permitted to practice in the courts as one of its officers. *Id.*
3. **UNFITNESS — HOW SHOWN.**— This unfitness may be shown by proof of crime, or of bad moral character, or of specific acts done by an attorney in the course of his practice, which show him to be unfit to be trusted. *Id.*
4. **INCITING CLIENT TO ATTACK THE COURT.**— An information, charging an attorney with inciting and encouraging his clients, who were parties to a pending litigation, to influence improperly the judicial action of the court in such litigation, by newspaper publications and printed circulars, disparaging the judicial conduct of the court, with intent to intimidate the judges in their action, *held* good on demurrer. *Id.*
5. **PARTICULARITY NOT REQUIRED.**— In such an information, the precise mode by which the attorney conveyed suggestions to his client, whether by letter, direct oral conversation, or by a message sent through a third person, need not be stated. *Id.*
6. **THE INTENT AND ATTEMPT SUFFICIENT.**— It is not necessary in such an information to aver that the publications suggested by the attorney were in fact made by the client. The offense is complete when the suggestion is made in earnest to a party likely to act on it. *Id.*
7. **PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT.**— Such an information is not to be held bad on demurrer upon the ground that the suggestion being one made to a client concerning a matter in suit, is a privileged communication. *Id.*
8. **COMMUNICATIONS BETWEEN CLIENT AND ATTORNEY.**— Short of an attempt to pervert justice by bringing to bear on the judge who is to decide, influences of corruption, intimidation, or the improper weight of personal influence, in a secret and unjustifiable manner

a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of the client. And this privilege extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy. *Id.*

9. **IMPROPER PROPOSAL TO INFLUENCE JUDGE.**—A proposition by a lawyer in a letter to his client, that he will visit with his family the family of the judge, and, while an honored guest, will avail himself of the freedom of conversation, to seek to commit the judge to the expression of opinions favorable to his client, should exclude him from practice in the courts and from the confidence of the judge. *Id.*

10. **SAME.**—A proposition by a lawyer in a letter to his client, that he will control newspapers and induce them to attack the judge, is evidence of a purpose on the part of such attorney to improperly influence the judicial action of the judge. *Id.*

11. **ATTEMPT TO SECURE PLEDGES IN FAVOR OF CLIENT.**—An allegation in an information against an attorney, that, when the appointment of two different persons at different times as receiver of a railroad was under consideration, he endeavored to secure from them, as a condition to his consent to their appointment, a secret promise that each of them would, if made receiver, appoint one Pickering general manager of the road, and one Atherton to some other place in its business, *held*, insufficient to warrant disbarment, in the absence of an allegation that the persons named were unfit, or that the pledge was not sought in the interest of his client. *Id.*

OFFICERS OF CORPORATIONS. See *Pacific R. R.*, 6.

1. **STATE AND MUNICIPAL OFFICERS — JUDGMENTS IN FEDERAL COURTS.**—The employment by United States courts of state or municipal agencies to enforce judgments or decrees of federal courts, must be in conformity with state statutes. *The United States ex rel. Wells, French & Co. v. The County Court of Knox County*, 606
2. **SAME — SAME — MANDAMUS.**—A writ of *mandamus* issued from a United States court to state officers cannot be for them to do what they have no legal right to do. The command of the writ can give them no legal authority beyond what was vested in them. *Id.*

OSAGE LANDS. See *Lands Patents*, 4.

PACIFIC RAILROAD.

1. **PACIFIC RAILROAD ACTS — OBLIGATION TO CONSTRUCT AND OPERATE A LINE OF TELEGRAPH.**—On the face of the acts of congress of 1862 and 1864, called "The Pacific Railroad Acts," the obligation of the Union Pacific Railroad Company and its branches to build

and operate for the public a telegraph line along its right of way, was an obligation which they could not abandon. *The Western Union Telegraph Company v. The Union Pacific Railway Company, The Kansas Pacific Railway Company, and The American Union Telegraph Company.* 581

2. ACT OF JULY 2, 1864.—By the provisions of the fourth section of the act of July 2, 1864, "An act for increasing the facilities of telegraph communication between the Atlantic and Pacific states and the territory of Idaho," the Union Pacific Railroad Company and its branches were authorized to devolve the duty of constructing and operating the contemplated line of telegraph upon the United States Telegraph Company, and thereby to relieve themselves from that duty. *Id.*
3. CORPORATION—RECOGNITION BY CONGRESS OF AN IMPERFECT OR INCOMPLETE ORGANIZATION.—If the United States Telegraph Company was not regularly and completely organized at the time of the passage of the last named act, the congress of the United States could adopt this imperfect or inchoate organization, and, if it was the purpose of congress to do so, confer upon it all the power specified in said act. *Id.*
4. INJUNCTION—MOTION TO DISSOLVE.—Without finally deciding, upon this hearing, whether the power to make the contract in question can be derived from the act of July 2, 1864, it is *held*, in view of the vast interests involved, and the serious consequences to follow a dissolution of the injunction, that for the purposes of this motion there is sufficient evidence of such authority under that act. *Id.*
5. ACCEPTANCE OF PACIFIC RAILROAD ACTS BY STATE CORPORATIONS.—State corporations accepting the provisions of the Pacific Railroad acts are subject to all the provisions thereof. Following the Sinking Fund Cases (99 U. S. 700). *Id.*
6. CONTRACT—DIRECTORS—PERSONAL BENEFIT OR ADVANTAGE RESERVED TO OFFICERS OF CORPORATION CONTRACTING.—As a general proposition, where one of a body of individuals jointly interested in a matter consents to take a special advantage to himself, and receives a special consideration for using his efforts to procure an agreement of the whole for the benefit of a third party, if such receipt of special advantages, whether of money or property, be kept secret from his copartners or joint stockholders or those interested, and they act upon the belief that he is governed by no other interest than that which is common to them all, the contract is void. But there are circumstances in connection with the contract in question, in this case, which may or may not take it out of this principle. There was, for example, no attempt at concealment;

the benefits secured did not flow to the individual but to the office, and there is no evidence that it amounted in point of fact to a pecuniary sum whose influence would be at all appreciable. *Id.*

7. **QUESTIONS OF DOUBT POSTPONED UNTIL FINAL HEARING.**—A contract will not be set aside on preliminary hearing on the ground of its invalidity except in a clear case; and since the objections to the contract in question may be removed on final hearing, they will not at present be regarded as fatal to it. *Id.*

PARTNERSHIP. See *Bankruptcy*, 1.

1. **PARTNERSHIP—SOLE SURVIVING PARTNER—PLEDGE OF PERSONAL PROPERTY FOR PARTNERSHIP DEBT.**—A sole surviving partner may transfer the choses in action and other personal effects of the partnership, by way of pledge or mortgage, to secure a partnership debt, and when such transfer is made in good faith, it is effectual against all the other creditors, as well as the representatives of the deceased partner. *Bohler, Husa & Co. v. Tappan*, 134
2. **DORMANT PARTNER—EVIDENCE—GENERAL REPUTATION.**—While evidence of general reputation may not be admissible to prove a partnership, still it may be competent upon the issue as to whether a member of a firm is a dormant partner. *Metcalf, Assignee, v. Officer & Pusey*, 325
3. **SAME—OSTENSIBLE PARTNER—NAME NOT IN FIRM STYLE.**—A partner is not to be deemed dormant because his name does not appear in the firm style; nor is it necessary to constitute one a dormant partner that his membership be universally unknown. It is sufficient if he is not an ostensible partner. *Id.*
4. **BANKRUPTCY—FRAUDULENT PREFERENCE.**—To constitute a payment made a fraudulent preference, under the bankrupt law, it is necessary to be shown that the person to whom payment was made had reasonable cause to believe the debtor insolvent, and knew that a fraud upon the bankrupt law was intended. *Id.*
5. **SAME—SAME—SUFFICIENCY OF EVIDENCE.**—Evidence in this case held sufficient to sustain the verdict that a payment made was a fraudulent preference under the bankrupt law. *Id.*

PARENT AND CHILD. See *Conveyance*, 4, 5, 6.

PAYMENT. See *Insurance*, 9.

1. **PATENT—INFRINGEMENT—DAMAGES—EVIDENCE.**—A rescinded contract in relation to the payment of royalty for the use of a patent is not competent evidence in determining the measure of damages for the infringement of the same. *Bussey v. Excelsior Manufacturing Co.*, 161
2. **PATENT—RESTRAINING ORDER.**—The function of a restraining order is to protect the plaintiff without unnecessarily oppressing

or annoying the defendant, and will, therefore, be framed according to the circumstances of each case. *Kirby Bung Manufacturing Co. v. White and others*, 155

3. SAME — DECREE OF COURT — GROUND FOR RESTRAINING ORDER.— In the case of an infringement, the final decree of a court of competent jurisdiction, restraining the validity of a patent, in the absence of collusion, furnishes a sufficient basis for an injunction or some form of a restraining or accounting order. *Id.*

4. SAME — PROOF IN ABSENCE OF DECREE.— "If there has been no decision as to the patent by a United States court, on the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor." *Id.*

5. PATENT — MILLING PROCESS — USE OF ROLLS.— A patent for the manufacture of middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, is void for want of novelty and uncertainty, when such rolls are inadequate to produce the result described. *Downton v. Yaeger Milling Co.*, 26

6. PATENT — INTERFERING PATENTS — SERVICE OF NOTICE OUTSIDE OF DISTRICT.— In proceedings for relief against the owners of an interfering patent, under section 4918 of the Revised Statutes, no provision is made for the service of notice upon parties outside of the district in which such proceedings have been instituted. *Liggett & Myers Tobacco Co. v. Miller and others*, 31

7. PATENT — WANT OF NOVELTY — CORRUGATED IRON APPLIED TO THE ROOF OR SIDES OF A BUILDING.— If the ordinary form of corrugated iron, when applied to the roof or sides of a building, does not give sufficient air spaces, there is no novelty in making them larger, and diminishing the surface of iron at the point where it is nailed to the wood work, although the objection may be thereby remedied. *Belt v. Crittenden and others*, 209

8. SAME — SAME — THICKNESS OF IRON — NAIL HOLES — FORMATION OF JOINTS.— There is no novelty in the fact that the iron, at the point of contact with the wood, is double in thickness, or that the nail holes at the joints may be made elongated in order not to interfere with the nails in case of expansion or contraction, lengthwise, of the corrugations; nor in the manner of forming the joints connecting the several sections of sheathing. *Id.*

PETITION. See *Removal*, 3, 6.

PLEADING. See *Officers*, 5, 6. *Bank Check*, 2. *Corporation*, 18. *Insurance*, 4.

1. PLEADING — WANT OF JURISDICTION — OBJECTION TAKEN BY ANSWER.— The Arkansas code abolishes pleas in abatement, and in that state there is no difference in the method of pleading matter abatement and matter in bar; and where a want of jurisdiction

over the person is not disclosed upon the face of the complaint, the objection may be taken by answer. *Harman v. Teutonia Ins. Co.*, 123

2. SAME — MATTER IN ABATEMENT — HOW PLEADED. — Matter in abatement must be pleaded with exactness, and ought to be certain to every intent. *Id.*
3. INSURANCE COMPANIES — NON-COMPLIANCE WITH STATUTE OF STATE — VALIDITY OF POLICIES. — By failing to comply with the requirements of the Arkansas statute, prescribing the terms upon which insurance companies of other states may do business in that state, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holder. *Id.*
4. SAME — SUIT ON POLICY — PROCESS — SERVICE ON STATE AUDITOR — ESTOPPEL. — A statute of Arkansas provides that no insurance company, not of that state, shall do business in the state until it has filed with the auditor a stipulation in writing agreeing that legal process affecting the company, served on the auditor of state, shall have the same effect as if served personally on the company. *Held*, that if an insurance company does business in the state, and issues policies to citizens of the state on property within the state, that in a suit on such a policy, service of process on the auditor was good personal service on the company, although the written stipulation to that effect was not filed with the auditor; that in such case the company was estopped to say that it had not filed the stipulation, and had not assented to such service. *Id.*
5. PLEADING — CERTAIN RULES RESTATED. — (1) In pleading, the parties respectively must aver the issuable facts and nothing more; (2) if a pleading has not sufficient issuable facts to constitute a cause of action or defense, or is mixed with statements as to evidence to support the same, the opposite party may demur; (3) if a pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable and others non-issuable, the opposite party may move to make the pleading more definite and certain; (4) but motions to strike out special clauses and sentences in a pleading will not be entertained. *Gause and another v. Knapp and another*, 75
6. CONTRACT — PREFERENCE. — A contract to give one of several creditors a preference over others, for consenting to a composition, is void. *Id.*
7. PLEADING — ANSWER — GENERAL DENIAL. — Under the rules of pleading established by the state of Missouri, as modified by the act of 1875, affirmative matters of defense cannot be set up under a general denial. *Mack and others v. Lancashire Ins. Co.*, 20

8. PLEADING—CONTRACT CONTAINING MUTUAL CONDITIONS.—In an action for the breach of a contract containing mutual conditions, performance or readiness to perform must be averred by the plaintiff. *Darland v. Greenwood*, 387
 9. PLEADING—CORPORATION.—An averment in a pleading that a corporation had power to execute a contract must be taken to mean that it had such power by virtue of the law of its being. *The Western Union Telegraph Company v. The Union Pacific Railway Company*, 418
 10. PACIFIC RAILROAD SYSTEM—ACT OF CONGRESS, JULY 1, 1862.—The several state railway corporations incorporated into the Pacific railroad system by the act of congress chartering the Union Pacific Railroad Company, approved July 1, 1862, and which were authorized to construct branches, and receive aid from the United States, are subject to the terms and conditions imposed by said act of congress. *Id.*
 11. SAME—TELEGRAPH FRANCHISE.—The Union Pacific Railroad Company is without authority to alienate its telegraph franchise or any property necessary to the performance by it of the duties imposed by law. *Id.*
 12. SAME—SAME—ACT OF CONGRESS, JULY 2, 1864, § 4.—But the fourth section of the act of July 2, 1864, authorizes said Union Pacific Railroad Company, or any company authorized to construct a branch of the Union Pacific Railroad, to transfer to the United States Telegraph Company, or its successor, the right to construct and operate the line of telegraph required by the Union Pacific Railroad charter to be constructed and operated. *Id.*
 13. CONTRACT—PUBLIC POLICY.—A provision in a contract between a telegraph company and a railroad company, to the effect that the telegraph company will transmit the family, private and social messages of the executive officers of the railroad company free, is against public policy, and immoral, and taints the entire contract, so that a court of equity will not enforce it, or grant any relief to a party claiming under it. *Id.*
- POSSESSION. See *Deed*, 1. *Mortgage*, 11.
- PRACTICE. See *Insurance*, 11.
1. PRACTICE—UNITED STATES CIRCUIT COURT WILL NOT REVIEW RULING OF STATE COURT.—In cause removed from the state to the federal court, the proceedings in the former will not be reviewed by the latter. The remedy to correct supposed error in such case is by appeal to the supreme court of the United States. *Brooks et al. v. Farwell et al.*, 182
 2. NON-RESIDENT DEFENDANT—MOTION TO QUASH SUMMONS ON—PLEA IN ABATEMENT. etc.—The state court having overruled motion to quash service of summons on a non-resident defendant,

and ruled that the proper method of raising the question is by answer in the nature of a plea in abatement, and such answer having been there filed, the ruling will not be reviewed in this court. *Id.*

3. ONE BROUGHT INTO A STATE UNDER PROCESS OF A COURT to attend upon the trial of a cause, is exempt from process in such state, while necessarily attending there in respect to such trial. *Id.*

4. PRACTICE—REMOVAL OF CAUSE FROM THE STATE COURT, AND REMANDING SAME.—Causes removed from state court may be remanded, on motion, when the record shows a want of jurisdiction in the federal court. If, upon the face of the record, the federal court has jurisdiction, objection to trial here can be raised only by formal plea to the jurisdiction. That a plaintiff conveyed his interest in the property in controversy to one of his associate plaintiffs, "for the purpose of conferring jurisdiction on" the federal court, no ground for remanding case, provided the sale was in fact made. Otherwise, if the transfer be without consideration, and the party pretending to convey still is the owner of the property. That would be collusive proceeding, and ground for remanding cause to the state court. But this is a question of fact which must be raised by plea. *Hoyt, Miller et al. v. Wright*, 130

5. PRACTICE—SUPERSEDEAS—MOTION FOR A NEW TRIAL—SECTION 1007, REV. ST., CONSTRUED.—A writ of error will operate as a *supersedeas*, under section 1007 of the Rev. St., if duly served "within sixty days, Sundays exclusive," after a motion for a new trial has been overruled. *Rutherford v. The Penn. Mut. Life Insurance Company*, 120

6. PRACTICE — RULINGS OF DISTRICT JUDGE WHEN HOLDING THE CIRCUIT COURT — WHEN REVIEWABLE BY CIRCUIT JUDGE.—It is well settled in the eighth circuit that the rulings of the district judge, while holding the circuit court, are not subject to review in the same court, by the circuit judge or justice, and the circuit judge will only sit to hear motions for new trials in cases tried in his absence, when the district judge so desires and requests it. *United States v. Biebusch*, 43

7. INDICTMENT—WITHDRAWAL OF COUNT—EVIDENCE.—The withdrawal of a count in an indictment does not render the evidence offered incompetent, so far as it is legally applicable to the counts of the indictment not withdrawn. *Id.*

8. SAME — FRAUDULENT SALE — FRAUDULENT POSSESSION—EVIDENCE.—Evidence of a fraudulent sale is competent to support a charge of fraudulent possession under a count in an indictment. *Id.*

9. **WITNESS — INFAMY — PROOF OF CONVICTION.**— Conviction of an infamous crime must be shown by the record, and does not affect the competency of the testimony of a witness. *Id.*
10. **JUDGMENT — ATTESTATION OF RECORD — REV. ST. § 905 — CERTIFICATE.**— The record of a judgment in the state of Illinois is not admissible in evidence in the U. S. circuit court of Missouri unless attested in accordance with section 905 of the Rev. St. and duly certified. *Id.*
11. **WITNESS — INFAMY — CONFIRMATION OF TESTIMONY.**— Evidence is admissible in confirmation of the testimony of a person who has been convicted of an infamous crime, in such and so many parts of his narrative as may satisfy the jury that he has told the truth, but should not, perhaps, be extended to such acts in the narrative as are generally well known. *Id.*

PRIVATE WAY.

1. **PRIVATE WAY USED BY PUBLIC WITH CONSENT OF OWNER.**— A proprietor of land who opens a private way upon his own premises is under no obligation to keep the same in repair for the safety of persons who may pass over it uninvited. *Nugent v. Wann*, 486
2. **SAME — DUTY TO PUBLIC.**— The proprietor of such a way owes no duty to the public to keep it in repair for their use, and whoever uses it does so at his own risk; provided that, knowing that the public are in the habit of using the way, the proprietor has no right to place therein anything that will endanger their safety. *Id.*
3. **SAME — POLICEMAN.**— A policeman, being a peace officer, has the right to pursue a criminal through a private alley at any hour or the night. *Id.*
4. **USE OF PRIVATE ALLEY BY PROPRIETOR.**— The use of an alley way, by the proprietor or his tenants, customers and employes, as a way for hauling fuel and carrying earth excavated by the proprietor, will not render the same a public way. *Id.*

PRIVITY. See *Bills of Exchange*, 6.

PROOF. See *Patent*, 4. *Practice*, 9. *Mortgage*, 19.

PUBLIC IMPROVEMENTS. See *Mississippi River*, 2, 3.

PUBLIC POLICY. See *Pleading*, 13.

PURCHASER. See *Foreclosure*, 8.

RAILWAY. See *Taxation*, 2. *Contract*, 7. *Eminent Domain*, 1, 2, 3, 4, 5.

1. **RAILWAY — MORTGAGE OF ROAD AND INCOME — GARNISHMENT OF RAILROAD COMPANY BY GENERAL CREDITORS.**— A general judg-

ment creditor of a railroad company, in a case where the trustees under a prior mortgage of the road and income never obtained possession of the road or demanded the income, was held entitled by virtue of a garnishment of the officers of the railroad company to the net income of the road between the date of a decree of foreclosure and the appointment of a special receiver, the decree of foreclosure being silent as to such income, and the road meanwhile being operated by the company. *Gilman, Cowdrey et al. Trustees, v. Illinois & Miss. Telegraph Co.*, 170

2. RAILROAD — FORECLOSURE DECREE — TERMS "SERVANT" AND "EMPLOYE" CONSTRUED.— An act of the legislature of the state of Minnesota provided that in a foreclosure sale of a railroad, the court granting the foreclosure decree should provide in such decree, or otherwise, that the purchaser should "fully pay all sums due and owing by such * * * foreclosed railroad company to any servant or employe of such company." *Held*, that the terms "servant" and "employe" did not include a secretary of such railroad company. *Wells v. The Southern Minnesota Railway Company*, 18
3. ACT OF CONGRESS, JULY 23, 1866 — LAND GRANT.— Under the act of congress of July 23, 1866, granting lands to the state of Kansas for the benefit of the St. Joseph & Denver City Railroad Company, the filing in the office of the secretary of the interior of the map of the location of the road was the location required, and from the date of such filing the line or route of the road is to be regarded as "definitely fixed." *Knevals v. Judson B. Hyde*, 403
4. VESTED RIGHT UNDER LAND GRANT.— From the date of such location the equitable title was vested in the railroad company, and a patent thereafter issued to defendant's grantor conveyed no title. *Id.*
5. NOTICE.— No other notice was required of the company than the filing of its map with the secretary of the interior. *Id.*
6. FORFEITURE.— With the question of forfeiture by reason of failure to complete the road, neither the defendant nor his grantor has anything to do. The right to declare such a forfeiture belongs to the government. *Id.*

RAILWAY COMMISSIONERS. See *Eminent Domain*, 5.

RATIFICATION. See *Sale*, 1. *Contract*, 6, 13.

REASONABLE TIME. See *Equity*, 9.

RECEIVER. See *Master and Servant*, 2.

1. RECEIVERS — ORDER OF COURT AS TO ACCOUNTING BEFORE MASTER CONSTRUED.— Order of court requiring the receivers of a railroad, which had been sold under a decree of foreclosure, to "pass their

accounts before the master," *held* to apply only to such accounts as had not been passed prior to said order. It did not require a re-examination of any accounts. *The Farmers' Loan & Trust Company v. The Central Railroad of Iowa*, 852

2. RECEIVER'S REPORT, HOW ASSAILED.—A receiver's report, which has been passed by a master, is only assailable by a direct proceeding in court alleging error, fraud, mistake and the like. *Id.*

RECITAL. See *Corporation*, 17.

REDEMPTION. See *Foreclosure*, 8.

REMOVAL OF CAUSES. See *Practice*, 4.

1. REMOVAL OF CAUSE—ACT MARCH 3, 1875—TERM PRIOR AND TRIAL SUBSEQUENT TO PASSAGE OF ACT.—The right to remove a cause from a state court, under the act of March 3, 1875, is lost where such cause was tried in a term which began before, but at a date which was subsequent to, the passage of that act. *The State of Missouri, etc., v. Merritt and others*, 65
2. REMOVAL OF CAUSE—DELAY IN FILING RECORD—REMANDING.—The only necessary consequence of failure to file the record of a case removed from a state court, under the act of March 3, 1875, by the first day of the next term after the application for removal, or within twenty days after such application, is to create a liability on the bond. Unnecessary delay, amounting to laches, in filing such record, prejudicing the other party, may be ground for remanding the case; but the party is not entitled for such cause, as matter of right, to have it remanded. Delay in filing record in this cause *held* not sufficient ground for remanding cause to state court. *Kidder v. Featteau*, 328
3. REMOVAL—TIME OF FILING PETITION.—Under the act of 1875, a petition for removal must be filed before or at the term at which the cause might first by law be tried, although the pleadings have not been settled at that time. *Murray v. Holden and others*, 341
4. REMOVAL—WANT OF CONTROVERSY—REVISED STATUTES, § 639.—There is no right of removal, under section 639 of the Revised Statutes, after a stipulation has been filed in the state court admitting the claim sued upon. *Keith and others v. Levi*, 343
5. SAME—ATTACHMENT—CONTROVERSY.—A controversy between citizens of different states, as to the validity of an attachment, may constitute a case removable, within the meaning of the statute, where the amount in dispute, exclusive of costs, exceeds the sum or value of \$500. *Id.*
6. SAME—SAME—AMOUNT IN CONTROVERSY—PETITION.—In such case the application for removal should be made upon the attachment issue, and should show affirmatively that the amount in value in that controversy was more than \$500. *Id.*

7. REMOVAL—ACT OF MARCH 3, 1875, § 2.—In order that a suit may be removed by either party, under section 2 of the act of March 3, 1875, all the persons forming the party on one side of the controversy must be citizens of states different from those of which the other party are citizens. *Ruble and others v. Hyde and others*, 513
8. REMOVAL—"SUIT * * ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES"—ACT OF MARCH 3, 1875, § 2—CONSTITUTION, ART. 3, § 2.—A case arises "under the constitution or laws of the United States," whenever, upon the whole record, there is a controversy involving the construction of either. *Cohens v. Virginia*, 6 Wheat. 284; *Mayor v. Cooper*, 6 Wall. 247; *Tennessee v. Davis*, 100 U. S. 275. *Van Allen v. Atchison, Colorado & Pacific Railroad Co.*, 598
9. SAME—TRIAL TERM.—Where a state statute did not fix the time within which the pleadings should be filed, it was the duty of the state court, upon the application of the parties, to fix a time, and, having done so, the cause was not triable until issue could be joined in pursuance of the court's order. *Id.*
10. SAME—BOND—SURETIES.—A federal court will not, upon motion to remand, enter upon inquiry as to the sufficiency of the sureties on a bond, conditioned as required by the removal act, and approved by the state court. *Id.*

REMEDIES. See *Contract*, 11.

REPUTATION. See *Partnership*, 2.

RESTITUTION. See *Contract*, 11.

RESTRAIN. See *Patent*, 2, 3.

RULES. See *Practice*, 6.

SALE. See *Foreclosure*, 1, 2.

1. SALE—FALSE PRETENSES—RATIFICATION.—The refusal of a vendor to take back goods obtained by false pretenses, in order to obtain a preference over other creditors, amounts to a ratification of the sale. *In the Matter of Walrup, Bankrupt*, 70
2. JUDICIAL SALE—ORDER OF CONFIRMATION.—An order of confirmation of a judicial sale may cure all irregularities in the course of the proceeding, but can add nothing to the authority of the officer to make it. *Wills v. Ohandler and another*, 276
3. SAME—DENIAL OF MOTION TO VACATE ORDER OF CONFIRMATION—ESTOPPEL.—A party is not estopped from bringing an action to set aside a judicial sale made without authority, by the fact that the court may have overruled the motion to set aside the order confirming such sale. *Id.*

4. SAME — SAME — PRESUMPTION — COURT OF EQUITY.— Where a motion made in a state court of Nebraska, five years after a judicial sale, for a vacation of the order confirming the same, was denied, and no ground for denial appeared in the record, *held*, that it would be presumed to have been denied because made too late for the court to grant such relief, but that it was not too late for a court of equity to grant such relief as party was entitled to. *Id.*
5. JUDGMENT — ENFORCEMENT AND SATISFACTION.— In the absence of statutory regulation, no one but a party, or his attorney or agent, can satisfy a judgment, or direct its enforcement by execution. *Id.*
6. SAME — SHERIFF — HAS NO CONTROL OVER JUDGMENT.— A sheriff has no interest in or control over a judgment, which may include his fees, that will authorize him to enforce it. If same is settled or discharged, he must look to the plaintiff or his attorney for his fees. *Id.*
7. SAME — CLERK, ISSUING EXECUTION.— A clerk has no authority, in the absence of statutory regulation, to issue execution without the direction of the plaintiff or his attorney. *Id.*
8. SAME — SATISFACTION OF — ATTORNEY CANNOT CANCEL.— An attorney who has given a release and satisfaction of a judgment cannot, without the consent of the other, cancel the same, and authorize an execution to issue. *Id.*
9. EXECUTION SALE — SHERIFF'S POWER.— In making an execution sale a sheriff acts by virtue of a power, and if no power exists nothing passes. *Id.*

SALVAGE. See *Admiralty*, 4.

SATISFACTION. See *Sale*, 5.

SEAWORTHINESS. See *Marine Insurance*, 8.

SERVICE OF NOTICE. See *Patent*, 6.

SERVICE OF PROCESS ON PERSON BROUGHT BY FORCE OR INDUCED BY FRAUD TO COME INTO JURISDICTION.— Where a person has been brought from another state by force, or has been induced to come into this state by the fraud and deceit of another for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed on proper plea, where the facts are undisputed. *Blair v. William Turtle and Jesse H. Bull*, 873

SERVICES. See *Admiralty*, 1, 2, 3. *Jurisdiction*, 8, 9.

SERVANT. See *Railway*, 2.

SET-OFF. See *Bankruptcy*, 6.

SHAREHOLDERS. See *Corporation*, 19.

SHERIFF. See *Sale*, 6, 9.

SOLE SURVIVING PARTNER. See *Partnership*.

SOLICITORS. See *Jurisdiction*, 9.

SPECIFIC PERFORMANCE. See *Vendor's Lien*, 1. *Corporation*, 27.
Contract, 14.

STATE AND FEDERAL COURT. See *Equity*, 7, 8, 9, 10.

STAMPS. See *Internal Revenue*.

STATUTE.

1. GEN. STAT. OF MINNESOTA (1878), CH. 75, § 2—EQUITY DOCKET.—
A suit brought under the statutes of Minnesota (Gen. Stat. 1878, ch. 75, § 2) by a party in possession of real property, to settle an adverse claim, belongs on the equity docket. *Meighen v. Strong*, 16 Minn. 177, followed. *Leggett and others v. Cole*, 515
2. STATUTE—CONTRACT—CONSTITUTION, ART. 1, § 10.—A statute providing in effect for the return, with interest, of all money paid by a purchaser at a tax sale, if by reason of invalidity or irregularity the sale could not be consummated, constitutes, when acted upon, a contract, within the meaning of article 1, § 10 of the constitution. *Corbin v. The Board of County Commissioners of Washington County, Kansas*, 521
3. SAME—SAME—SAME.—A subsequent statute, providing in effect that such purchaser should have no right to the return of his money in any case, unless the board of supervisors should see proper to so order, is void in so far as it purports to apply to pending cases, and to affect existing vested rights. *Id.*
4. SAME—SAME—SAME.—A subsequent statute, providing in effect that, after the conveyance of the land, the money should not be refunded unless the party claiming under the tax deed should deliver a quit-claim deed, "executed to such person or persons as the commissioner may direct," is a reasonable and proper exercise of the power of the legislature to modify without impairing the remedy, and is therefore valid. *Id.*

STATUTE OF LIMITATION. See *Jurisdiction*, 1. *Mortgage*, 8.

STATUTORY BAR. See *Equity*, 18.

STOCK. See *Corporation*, 10.

STOCKHOLDER. See *Corporation*, 6, 12. *Lease*, 2.

SUBPŒNAS. See *Jurisdiction*, 8.

SUPERSEDEAS. See *Practice*, 5.

SURETIES. See *Removal*, 10.

TAX LIEN. See *Internal Revenue*, 1.

TAXATION. See *County Bonds*.

1. TAXATION OF INCOME OF NATIONAL BANKS — DISTRAINT BY COLLECTOR.— The act of congress of July 14, 1870 (16 Stats. at Large, 260, 261, secs. 15, 17), imposes taxes upon the income and profits of national banks for 1870; and if the bank refuses to pay such taxes duly assessed upon notice and demand, the collector or deputy collector may, as authorized by act of congress (16 Stats. at Large, pp. 101, 106), distrain therefor. *State National Bank of Minneapolis v. H. G. O. Morrison*, 204

2. LOCAL TAXATION FOR BENEFIT OF RAILROAD CORPORATION — STATUTES CONSTRUED.— The charter of a railroad company enacted in 1865, authorized the corporate authorities of any city, town or county to subscribe to its capital stock, issue bonds therefor, and levy a tax of not to exceed one-twentieth of one per cent. per annum on the taxable property of the municipality to pay same. A subsequent act, passed in 1868, authorized subscriptions by townships, in pursuance of a vote of the people, to the stock of any railroad company, building or proposing to build a railroad into, through, or near the township voting the subscription, and authorized taxes to be levied to meet the payments on account of such subscriptions. *Held*, that to pay the bonds issued under the latter act, the respondents were bound to levy whatever tax was necessary for that purpose, and were not restricted to one-twentieth of one per cent. per annum. *United States ex rel. Foots v. County Court of Howard County*, 218

3. CONTRACT — LAWS IN FORCE WHEN CONTRACT WAS MADE — SUBSEQUENT LEGISLATION.— Laws in force when such bonds are issued, and which provide for taxation to pay them, enter into the contract between the bond holder and the state, and as against the former such laws cannot be repealed. Otherwise, as to acts enlarging the taxing power passed after the issue of such bonds. *Id.*

TESTIMONY. See *Practice*, 11.

TITLE. See *Mortgage. Indian Treaty*, 1.

TITLE — PRIMA FACIE EVIDENCE — TAX DEED — RECITAL.— In Minnesota a tax deed is not *prima facie* evidence of title, unless it be first shown that the county auditor had authority to make the deed; and a mere recital in such deed that the state auditor directed the sale will not be sufficient. *Madland v. Benland*, 24 Minn., 372. *Shearer v. Corbin, Corbin v. Shearer*, 306

TOP OR APEX. See *Mining Law*, 2.

TRADE MARK.

1. **TRADE MARK DECISION OF SUPREME COURT — EFFECT OF.**— The decision of the supreme court of the United States holding the trade mark legislation of congress to be unconstitutional and void, does not affect the validity or impair the force of a decree enjoining the use by defendant of a certain label or trade mark, it appearing that the injunction suit wherein said decree was rendered was not a statutory but a common law proceeding. *The United States v. John Roche*, 385
2. **COMMON LAW REMEDY FOR VIOLATION OF TRADE MARK.**— The right of the proprietor of a trade mark to the exclusive use of the same, and to protect and enforce his exclusive right by proceedings in chancery, exists by virtue of the common law, and independently of the statute. *Id.*
3. **WHAT AMOUNTS TO INFRINGEMENT OF TRADE MARK.**— The defendant had no right to imitate the trade mark of the plaintiff in the injunction, by using in his label or trade mark any of the prominent or distinguishing words of said plaintiff's trade mark. *Id.*

TREATY. See *Indian Treaty*, 1. *Land Grant*, 1.

TRIAL. See *Removal of Causes*, 1.

TRUSTEE. See *Bonds*, 4.

ULTRA VIRES. See *Corporations*, 1, 21, 29. *Lease*, 2. *Contract*, 10, 11.

UNLICENSED PILOT. See *Marine Insurance*, 3.

USURY. See *Bankruptcy*, 6.

1. **USURY — QUESTION OF FACT.**— Any agreement, device or shift to reserve or take more than the law permits for the use of money loaned is usury, and whether by such means more than the legal rate of interest has been contracted for, is a question of fact to be collected from the whole of the transaction as it passed between the parties. *The Missouri Valley Life Insurance Company v. Kittle and others*, 234
2. **SAME — AGREEMENT FOR INSURANCE IN LENDER'S COMPANY.**— A transaction whereby a party, in order to secure a loan of money, contracts to pay twelve per cent. per annum interest, the maximum rate allowed by law, and also as a part of the same transaction, and in consideration of such loan, agrees to take from the party loaning the money a policy of insurance, and to pay premiums thereon, is usurious under the statute of Nebraska. *Id.*
3. **SAME — PAYMENT OF INSURANCE PREMIUMS.**— Payments made in such a case, under the name of premiums on the insurance policy, must be regarded as paid on the loan; the insurance contract, made as it was to cover usury, being held void. *Id.*

VEIN. See *Mining Law*, 1.

VENDOR'S LIEN. See *Equity*, 8.

VENDOR'S LIEN — ASSIGNMENT — FAILURE OF CONSIDERATION — SPECIFIC PERFORMANCE.— A partial failure of consideration does not render the assignment of a vendor's lien void, and the assignor cannot subsequently seek to enforce the lien by a suit for specific performance before such assignment has been duly avoided. *Green v. Betts and another*, 72

WAREHOUSEMEN.

WAREHOUSEMEN — RECEIPT HOLDERS — FRAUD — EQUITABLE RELIEF.— When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting. *Dows and others v. Ekstrone*, 434

WARRANTY.

1. **COVENANTS OF WARRANTY — DEFENSES.**— In an action for breach of covenant of warranty, the defense that the covenant sued upon was a joint one, and that it was sued upon as several, can be made under an answer denying there is anything due. *Patrick v. Leach and others*, 250

2. **DEED — STATEMENT OF CONSIDERATION.**— The statement of the consideration in a deed is *prima facie* only, and may be rebutted. *Id.*

3. **SAME — ESTOPPEL — WASTE.**— One who has given a deed of lands with covenants of warranty is estopped from denying that the grantee is the owner, and cannot complain of waste committed by such grantee. *Id.*

4. **WARRANTY — COVENANT — DAMAGES.**— In an action for breach of covenant of warranty, the measure of damages is the consideration money, with interest. *Id.*

WASTE. See *Warranty*, 3. *Mortgage*, 20.

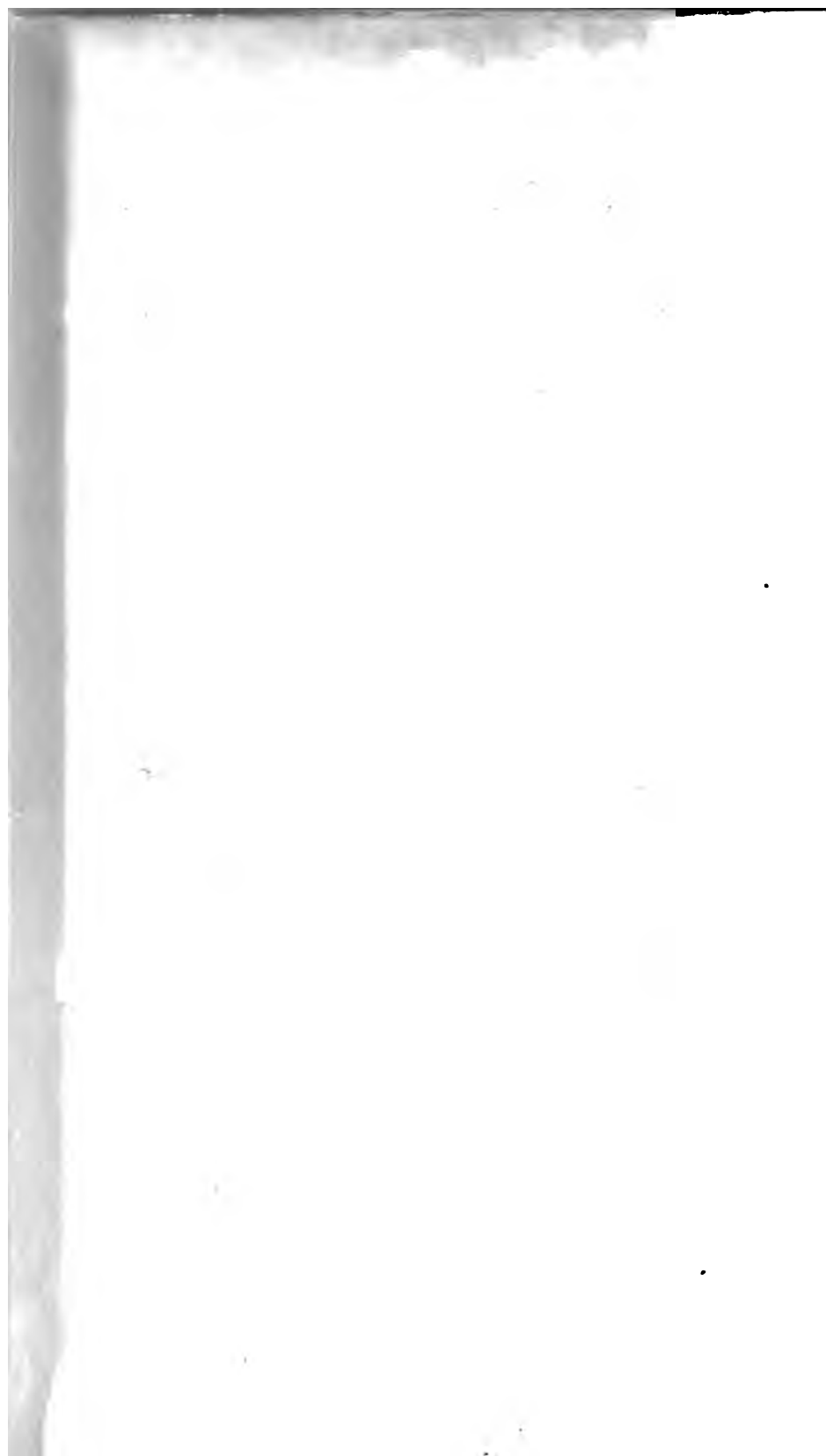
WIFE. See *Bonds*, 3.

WILL.

1. **WILL — CODICIL — CONSTRUCTION.**— A testator is presumed to have used words in their natural sense, and where he has attached a codicil to his original will the two are to be construed together, and the will is not to be regarded as revoked by the codicil unless such appears to be the intention. *Boyd and others v. Boyd and others*. 268

2. **SAME — SAME.**— Certain specific devises in a will, held not to have been revoked by a subsequent codicil. *Id.*

WITNESS. See *Practice*, 9, 11.



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